COURT OF CLAIMS.

REPORTS

AND

DIGEST OF OPINIONS

DELIVERED SINCE THE ORGANIZATION OF THE COURT.

BY

JOHN C. DEVEREUX,

COUNSELLOR AT LAW.

WITH AN APPENDIX,

CONTAINING

I. STATEMENT OF THE ORIGIN AND HISTORY OF THE COURT.
II. ACTS OF CONGRESS RELATING TO THE COURT.
III. RULES OF COURT.
IV. LIST OF COMMISSIONERS TO TAKE TESTIMONY.
V. LIST OF ATTORNEYS AND COUNSELLORS OF THE COURT.
VI. ARTICLES ON THE CHARACTER, FUNCTIONS AND JUDICIAL POWERS OF THE COURT.

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PREFACE.

THE following Abstract and Digest, or Digested Abstract of Opinions, delivered by their Honors, the Presiding Judge and associate Judges of the Court of Claims, since its organization, is offered to the profession and the public at large, with a hope that the work may supply, to some extent, the want of Reports *in extenso* of the decisions of that able and most important tribunal.

The Abstract was executed, from time to time, in parts, as the opinions appeared, at the expense of much labor, to familiarize the author with decisions and rulings of the Court, especially for purposes connected with his own practice before it. Those parts or portions are now, for the first time, in these pages, brought into a collected shape, and digested. He submits the results of his painstaking, confident only of their accuracy, to the better judgment of his professional brethren.

From the peculiar character and functions of the Court of Claims, its decisions or judgments are comprised in, indeed are, its Opinions. They, necessarily, are complete reports of the facts or evidence as well as deductions of law and fact, in the cases to which they respectively belong.

In each case, which would admit of it, as connected with his report of the matters adjudged, the author has sought to present a careful and full summary or synopsis of the material

facts, arranged so as to give the non-professional, as well as professional reader, a correct general knowledge of the claim therein presented for adjudication, for his information or guidance. Thus, with the addition of several leading opinions, given at length immediately after the Digest, and the Appendix, containing all information, accessible, relating to the Court, its transactions, and history within and outside of Congress, it is confidently believed this volume will prove a useful *Vade Mecum* for practitioners, claimants, and those generally having business connected with or before the Court.

He would here respectfully offer his acknowledgments to the Bench, and officers of the Court, for aid in securing copies of its opinions. From M. THOMPSON, ESQ., OF THE WASHINGTON BAR, his associate in professional business before the Court of Claims, the author has received much assistance and valuable suggestions.

NEW YORK, *October*, 1856.

JUDGES OF THE COURT OF CLAIMS.

HON. JOHN J. GILCHRIST, *Presiding Judge.*

" ISAAC BLACKFORD, } *Judges.*
" GEORGE P. SCARBURGH, }

SAMUEL H. HUNTINGTON, Esq., *Chief Clerk.*

FOR THE GOVERNMENT.

MONTGOMERY BLAIR, Esq., *Solicitor.*

DANIEL RADCLIFFE, Esq., *Assistant Solicitor.*

JOHN D. McPHERSON, Esq., *Deputy Solicitor.*

The Court Room and the Offices of the Solicitor and Chief Clerk are in the North extension of the Capitol.

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REPORT

OF

THE HON. JOHN JAMES GILCHRIST,

PRESIDING JUDGE OF THE COURT OF CLAIMS,

UPON THE

CHARACTER AND EXTENT OF THE BUSINESS AND OPERATIONS OF THAT COURT.

To the Senate and House of Representatives
of the United States:

THE undersigned, presiding judge of the Court of Claims, asks leave respectfully to make the following statement.

It is presumed that as the court is of recent origin, as the reports of its decisions are, by the act establishing the court, to be made to Congress, and as its operations can be but imperfectly known except to those who are immediately engaged in their execution, some statement of the character and extent of its business may be acceptable.

Erroneous opinions may be entertained in relation to the nature of the cases which are presented to the court, and it is desirable, from the experience of the last nine months, to make to Congress such a statement as will render intelligible its position and duties.

The act establishing the court provides that the court "shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein, and also all claims which may be referred to said court by either House of Congress."

In relation to the question of jurisdiction, we have been careful not to exceed the powers conferred by Congress. We have endeavored to limit those powers as much as possible, thinking it to be much safer and better rather to fall short of, than to exceed the jurisdiction conferred. Acting upon this principle, we have decided that in order to justify a decision in favor of a claimant, his claim must in all cases be founded upon some legal right. This principle has been adopted in the cases of Todd *vs.* the United States, and Lindsay *vs.* the United States. The court has not regarded itself as a council to advise Congress what was just and equitable, nor as a jury to exercise a merely discretionary authority. Where a claim has been referred to us by either House of Congress, we have not supposed that the whole power of Congress over the matter was thereby delegated, but that we were to report our decision, whether the claim was founded upon any legal right. Our opinion has been that what was required by general principles of justice, irrespective of law, was a matter, the decision of which was not intended to be conferred upon the court.

As to the business of the court, we are convinced that no one who has not had personal experience on the subject, can have any correct idea of its diversity, its intricacy, its perplexity, the exhausting labor necessary for its investigation, or the large sums of money it involves. Until the institution of this court, there had never been anything like a systematic inquiry into the modes of action by the government through the executive departments, or the relation in regard to contracts and the liabilities arising therefrom which the government bore to the citizens. It was inevitable, and it is astonishing that it should not have been sooner perceived, that among twenty-five millions of people, inhabiting the almost boundless territory comprehended by the Union, innumerable questions of the most difficult and delicate nature must have arisen, delays in the decision of which were alike discreditable to the moral sense of the people, and the public faith of the government, of which the people were the foundation. It has

been often asserted and proved by the experience of the British Parliament, that legislative bodies are unfitted, by the pressure of great public interests, from careful judicial investigation into private rights. The consequence has been in our country that claims accumulated until their very magnitude repressed all willingness to investigate them, and a state of things arose which made it hopeless almost to present a claim against the United States with any prospect of a decision.

It may be remarked, in relation to this point, that many of the cases before us belong to the history of a past generation They have been pending before Congress during periods varying from five years to eighty years, and in numerous instances, although reported upon by committees, their merits do not appear to have received a careful investigation.

Such was the condition of affairs when we entered upon the discharge of our duties. Our field of action was entirely new. We had no precedents to guide us. It was necessary at once to adopt some system of rules for the transaction of business. The ordinary rules of practice in courts of law were obviously inapplicable. We were forced to adopt rules in advance of any experience upon the subject, conscious that we should be forced often to modify, and sometimes to abrogate them. We found numerous cases involving questions entirely out of the path of ordinary legal investigation, requiring a degree of care and study rarely necessary in courts of justice. Cases of contracts intricate in their details, imperfectly defined by the evidence, reducible with difficulty to any legal principles, and enormous in amount, met us at the threshold. Cases involving the proper construction of treaties, important questions of public law, and that most difficult and delicate of all questions, the responsibility of the United States to their citizens, were laid before us. The construction of acts of Congress, the legitimate powers of the executive departments, the duties and liabilities of government officers, the constitutional powers of the general government, the duties of neutral nations, and questions arising out of a state of war, were all, directly or in-

cidentally, to be inquired into. It cannot be presumed that, with a due regard to our own reputation or to our official oaths, we were disposed to pass lightly upon questions of such momentous importance. Our object has been to give each case such a degree of care and patient attention as would enable us to use it as a precedent in subsequent cases of a like character. Our desire has been, not to get rid of the cases, but to decide them; and in order to do that, they must be carefully examined. One case, involving no less than two millions of dollars, occupied three weeks in the argument. Another case, of great importance as to principle, required two weeks. These cases were argued by eminent counsel. Many other cases of consequence have required from three days to a week. It is difficult to estimate the amount involved in the cases pending. It is sufficient to say that it is very large.

It is taken for granted that the object of Congress was to ensure the award of equal and even-handed justice to the claimant and to the government alike. We are convinced that with the present force that object cannot be accomplished as it should be. The duties of the solicitor have been performed with a conscientiousness and fidelity to the United States worthy of all imitation. But no one lawyer, however experienced and eminent, can properly represent and protect the interests of the government. The cases are so numerous, his duties are so harassing, and his labors so unceasing, that this is entirely impracticable. He is, in every case, opposed to eminent counsel, and forced to perform an amount of physical labor exhausting to any one. The interests of the government cannot be properly guarded without an immediate increase of the persons whose duty it is to represent them.

According to the provisions of the act of Congress, it is necessary that the court should act twice upon every claim brought before them. The allegations in the petition must first be examined in order to determine whether, admitting the facts stated to be true, the claimant is legally entitled to relief. If, in the opinion of the court, the facts alleged, even

if true, do not state any cause of action, there is an end of the case, so far as the action of the court is concerned. If the court should be of opinion that the facts stated, if proved, would entitle the claimant to relief, then an order is made for the taking of testimony. When the testimony is taken, the case is presented to the court upon the evidence, and the inquiry then is, whether the allegations are proved. It is evident that many of the most important questions which can arise, must be presented upon the statements in the petition in advance of the testimony, and the attention of the court has often been necessarily devoted to cases in this position. The law requires us to state not only our opinions, but the reasons for them; and this duty, with the advantage of but few precedents to guide us, has been extremely onerous.

Our undivided attention has been given to hearing arguments in court and to drawing up opinions after the adjournment. These duties have required *all* our time. We shall have been in session continuously for nine months, with only such recesses as have been absolutely necessary to investigate the cases argued and to draw up the opinions. To perform this labor there are but three judges, and every lawyer and every reflecting man must see that there is no tribunal in America of which more is required, whether we regard the complexity, the importance in point of principle, or the pecuniary value of the claims submitted. The duties of all the officers connected with the Court of Claims have proved to be extremely arduous. Not only the judges and the solicitor but the chief clerk also have been taxed to the extent of their ability. According to the practice which we found established, the decisions of the court are to be communicated to each House of Congress. This has rendered duplicate reports necessary. We have not as yet appointed an assistant clerk, because we desired that the business should be conducted in as economical a manner as possible; but experience has shown that not only an assistant clerk is necessary, but that the compensation of the chief clerk is altogether below what is re-

quired to induce a man of character, integrity, and capacity to continue to hold the office.

Under all the different circumstances attendant upon the commencement of business in a tribunal of such a peculiar character as the Court of Claims, we hope to present to Congress before the end of the present session, if we shall receive the evidence that is expected, our final decision in one hundred and twenty-five cases. We shall have examined and ordered testimony in two hundred cases, and we shall have drawn up nearly a hundred elaborate opinions in questions of law. More, we think, could not reasonably be expected, and we have the consciousness that all our time and capacity have been devoted to the performance of our official duties.

Respectfully submitted.

JOHN JAMES GILCHRIST.

JUNE 23, 1856.

DIGEST OF OPINIONS.

ACCOUNTS.

1. From April, 1845, to June, 1849, the claimant was Navy Agent and Acting Purser, and in both offices received and disbursed the public money, which he received from the Treasurer as Navy Agent, rendering separate accounts for the money received by him, in each of the offices. He charged himself, as acting Purser, with a sum of $561 10, as received from himself as Navy Agent, but did not give himself a corresponding credit in his account as Navy Agent. In his accounts up to June, 1849, certain sums having been disallowed him, the Treasury Department instituted a suit against him. On the trial, he was first made aware of the mistake in the sum of $561 10, (which was known to the Department at the time it occurred, although the claimant was not informed of or allowed it,) but at the instance of the Court, it was not admitted as a set-off, but reserved for future examination by the accounting officers. Afterwards, and prior to November, 1854, the claimant applied to the Department for this sum, but its payment was refused, on the ground that the claim could not be re-opened after a judicial investigation of all his accounts. *Held:* the claimant is entitled to recover the said sum of $561 10, as due him by the United States, but without interest. Per Gilchrist, P. J. *White* v. *The United States.*

2. In the settlement of the accounts of the claimant, a

major in the army, at the Treasury in 1839 and 1841, a charge of $812 50 was duly considered, passed upon and admitted to his credit. In August, 1842, upon settlement of his accounts, the item was again taken up, re-examined, and the amount charged to him. In October, 1851, the Secretary of War decided that the sum should be allowed. Again, in December, 1851, such allowance was rescinded by the Secretary of War. It was not contended, on the part of the Government, that the means of information were not at hand in the War Department when the item in question was credited to the claimant; or that the same evidence upon the matter did not exist at that time which existed in 1851; or that there was any attempt at concealment on the part of the claimant. *Held:* the credit of $812 50 to the claimant was improperly rescinded, and he has a right to have that sum credited to him in his account with the United States. Per Gilchrist, P. J. *Chase* v. *The United States.*

3. The petitioner, a major, officer in the engineer corps, claims $130, paid for the hire of a fishing smack to convey him to Havana from Key West, where he was absent on special duty, in order to intercept the steam packet, and thus take the quickest mode of returning to his station; and the extraordinary circumstances of the case, in the opinion of the chief of the engineer corps, justified a resort to such means of return, although comparatively expensive, but he did not recognize it as a valid claim against his department. And the Quarter-Master General decided that the determination of the question came within the province of the engineer department. The Secretary of War merely deciding he did not "feel authorized to allow this account." *Held:* (upon the statement in evidence of the chief of the engineer corps,) that the course in question pursued by the claimant was proper and necessary for the public interests intrusted to his charge; that he expended the $130 for the service and benefit of the United States, and the amount should be paid him like any other

account of engineer officers for travelling in the discharge of their duty; and which particular department it was a proper charge upon is entirely immaterial. That it was money properly paid in the service and for the benefit of the United States, and is therefore allowed to the claimant. *Ibid.*

4. The petitioner, a major in the army, claims to be allowed, in account with the Government, the sum of $50, paid by him to the master of the schooner Surprise, employed in the engineer service under the superintendence of claimant, at a specified rate of compensation. The claimant, finding that he could lay up the vessel sooner than was expected, did so, and, discharging the captain, paid him an extra month's pay, which he thought justice required. *Held:* this payment was made without authority of law, or of the Department, and does not furnish a legal cause of action against the United States. *Ibid.*

5. The petitioner, a major in the army, claims from the United States $150, paid for medical services. The engineer department was entitled to the services of a surgeon. None could be procured. The Commodore permitted Dr. W., an assistant surgeon in the navy, (to whom the $150 were paid,) to attend. He was not ordered to it. It was no part of his duty. The claimant, as senior officer, employed him and made the contract with him, which was approved by the engineer department. The charge was disallowed at the treasury, on the ground that Dr. W., as an assistant surgeon in the navy, was prohibited, under section 2 of the act of March 3, 1835, (4 Stat. at large, 757,) and also by section 3 of the act of March 3, 1839, (5 Stat. at large, 349,) from receiving the allowance. *Held:* that the true construction of the act of March 3, 1835, did not prohibit Dr. W. from receiving compensation for his services not within the line of his duty, from third persons; that the petitioner lawfully paid him the sum claimed, and has a right to have the said sum ($150) credited to him, the petitioner, by the United States. *Ibid.*

6. Where a sale was made by the United States acting through their officers, in Mexico, during our occupation, of personal property in their possession, to which they claimed a title by the rights of war, which property was delivered to and paid for by the vendee, but was subsequently, upon the report of a military board of inquiry, taken from him and delivered to the rightful owner, *held*, that such retaking was the act of the United States, and their vendee has an action thereon against them. Per Gilchrist, P. J. *Porte* v. *The United States.*

7. *It seems*, the doctrine that, between man and man, an action lies to recover back money paid under a mistake of fact, and that it is unconscientious in such a case to retain it, obtains equally as regards the government. Per Scarburgh, J. *Beatty's executor* v. *The United States.*

8. Where a party once had full knowledge of a fact, which he had forgotten at the time of making a payment of money, his forgetfulness of it was such a mistake of fact as entitles him to recover back the money.* *Ibid.*

9. "If a man has actually paid what the law would not have compelled him to pay, but what in equity and good conscience he ought, he cannot recover it back." Per same. *Sturges et al.* v. *The United States.* Second Opinion.

10. Where money is paid on a fair and deliberate compro-

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* Where the court affirms or accepts a principle or decision at common law of general application, it was deemed advisable and proper to state such principle or decision in the digest. The same course is adopted as to principles or dicta of public law.

mise of a doubted and doubtful right, both parties standing on equal terms, and respectively taking their chances of the result, it cannot and ought not to be recovered back. *Ibid.*

ACTS OF CONGRESS.

11. Any person who is entitled to a benefit under an act of Congress may waive it, but he cannot waive rights belonging to third persons without their assent. Per Gilchrist, P. J. *Magruder* v. *The United States.*

12. The accounting officers of the Treasury cannot superadd a condition not required by the act of Congress, which is supreme in matters of legislation. Departmental regulations must be in subordination to the law of Congress. *Ibid.* Second Opinion.

13. Executive officers, when an act of Congress admits evidence of a certain kind, have no right, *it seems*, to decide that they will not render a decision in favor of a claimant, unless he produces evidence of a different kind. *Ibid.*

14. This court may adopt rules of practice, and the departments make regulations, but they must be in strict subordination to law; wherever there is any antagonism between them, the "rules of practice" and "regulations" must yield, and the law of Congress govern. *Ibid.*

ALLEGIANCE.

15. It is on the duty of protection that the duty of allegiance depends. Per Gilchrist, P. J. *Owners of the Brig Armstrong* v. *The United States.*

ARBITRATION.

16. If the United States, in the plenitude of their power, see fit to submit the claim of a citizen to arbitration without his assent, they should make the most careful and ample provision that he shall be fully and fairly heard, and that he shall have all reasonable opportunity to lay before the arbitrator the evidence on which he relies. *Ibid.*

17. Where the claim of a citizen is submitted by our government to arbitration; whether the matter in dispute is a question of law, or a mixed question of law and fact, the claimant has a right to be heard before the arbitrators. *Ibid.*

18. Even if, in such case, the validity of the claim submitted to arbitration was a doubtful question, that does not at all affect the right of the claimant to be heard; so much the greater call was there upon the United States to provide that he should be heard. *Ibid.*

19. When the United States make a treaty which, by their construction of it, precludes the claimant from being heard, and refuse their sanction and authority to him to appear and present his case before the arbitrator under that treaty, and the award is adverse to the claimant, under these circumstances the United States are bound in damages. *Ibid.*

20. The government of the United States, *it seems*, has the right, acting for the whole people, to submit to arbitration any controversy with a foreign government, in which public interests are concerned. *Ibid.*

21. The government of the United States, *it seems*, has the power to submit to arbitration the claim of one of its own citizens upon a foreign government, which it has been prosecuting,

in such a way as to preclude itself from pressing that claim upon such foreign government, or insisting upon it in any way as a cause of war, or a matter of national concern. *Ibid.*

22. There is a broad distinction between the submission to arbitration of a case involving national interests exclusively, and the submission to arbitration of a case relating to private rights alone, where the only matter of public concern is the general duty of a government to protect its citizens. *Ibid.*

23. Where a case relating to private rights alone is submitted by our government to arbitration, it must be done with a due regard to the rights of the citizen. *Ibid.*

24. If the rights of the citizen be disregarded and sacrificed, by submitting his case to arbitration without a due regard to his rights, it is the dictate alike of law, common sense and justice, that the government by which his rights have been sacrificed should make him restitution. *Ibid.*

25. To relieve a government from liability to a citizen for submitting his case to arbitration, it should appear, (1) that the case was one proper to be submitted; (2), that he had an opportunity of being heard before the arbitrators by argument and proofs; (3), that the award was certain, definite and within the submission; and (4), that the arbitrator did not exceed his powers. *Ibid.*

26. By submitting to arbitration the just claim of a citizen, and thereby giving the arbitrator a discretionary authority to allow or reject it at his pleasure, the government puts it out of the power of the United States to perform that first and most sacred of duties, protection of the rights of the humblest citizen. *Ibid.*

27. Have the United States the right to submit to arbitra-

tion the claim of a citizen upon a foreign government without his assent or against his protest? *Quere.—Ibid.*

28. The consent of the citizen, in such a case of submission to arbitration, would estop him afterwards from objecting that such a submission was entered into. *Ibid.*

29. Where the claim of a citizen was submitted by our government to arbitration, because the respective governments could not agree upon the question of law, and the matter in dispute and submitted was the simple question of law, but that question was not determined at all, the award being founded solely upon the facts; *Held:* the award is void, (1) because it does *not* settle the matter in dispute and the matter submitted, and (2) because it *does* settle the question of fact which was not submitted, and thus exceeds the submission. *Ibid.*

30. When our government submits the claim of a citizen upon a foreign power to arbitration, if he is not permitted a hearing, or to be represented before the arbitrator and heard in defence of his rights, and the award is adverse to him, the United States become responsible to the claimant for the damages he sustains. *Ibid.*

31. The award, in such case, having been made against the United States, *they* are answerable to the claimant for the loss he has sustained, upon the principle that a nation, being entitled to the allegiance and obedience of its citizens, is solemnly bound, in return, to protect not only their persons but their property. *Ibid.*

32. An award or arbitration made without the party having an opportunity to be heard, rests neither upon law nor justice. *Ibid.*

33. It is a fundamental rule of construction, in reference to

every transaction in the nature of a judicial proceeding, that the contract of submission necessarily implies, that the arbitrator or judge is not authorized or empowered to decide the question in controversy, without giving the parties an opportunity to be heard in relation thereto. *Ibid.*

THE ARMY.

34. During our war with Mexico the claimant was a captain in the service of the United States. He was attached to the Kentucky regiment of cavalry. While stationed at Louisville, July 4, 1846, he was ordered by Col. F., his commanding officer, to take a reinforcement, to enter a certain house and bring in deserters supposed to be there. The claimant obeyed. Anticipating from what had previously occurred, that resistance would be made, the house was quietly surrounded, and orders given that all the doors should be simultaneously broken open. This was done. It was deemed, it seems, a prudent course, and received the commendation and approval of Col. F. After the return of the claimant from Mexico, a suit was instituted by the proprietor of the house for the alleged trespass, in which a verdict was obtained and judgment rendered against him. This judgment, in October, 1848, amounted to $532 20, which he paid. He claims to be reimbursed, by the United States, the amount so paid by him on such judgment. *Held:* There is no legal ground for the claim. Per Blackford, J. *Clay* v *The United States.*

35. Assuming the order of Col. F. to have been that the claimant should break open the house in question, for the purpose stated; *held*, also: it was no justification for the trespass because the order was unlawful. If it was necessary to enter the house to search for deserters, the proper authority to do so should have been obtained from a civil magistrate. *Ibid.*

36. *Held,* also: An officer is justifiable in acting under the order of his superior officer, if that order is legal, but not if the order be illegal. *Ibid.*

37. The claimant, a captain in our service, during the war with Mexico, while in the active performance of his duty, moving rapidly from place to place, under orders, was, in 1846, taken prisoner at Encarnacion. Under the circumstances, all the baggage and property which he had with him in Mexico were lost, including many valuable papers. Their actual cost amounted, as alleged, to upward of $1,370. The claimant seeks to recover the amount from the United States. *Held:* the claim being for the value of goods taken by the enemy in time of war, cannot be sustained. *Ibid.*

38. The regulation of the army, No. 1,259, (Army Regulations, 331,) authorizes the senior officer, "when medical or surgical aid is required, if no surgeon or assistant surgeon of the army be at or near the place," to procure such aid, and imposes no limitation upon him in the exercise of his authority to do so. Per Gilchrist, P. J. *Chace* v. *The United States.*

BAILMENT.

39. Under a contract as private carrier for hire, to carry and deliver, the law implies only the promise to use ordinary diligence. Per Scarburgh, J. *Gibbons et al.* v. *The United States.*

40. Private carriers for hire are bound only for ordinary diligence, and responsible only for ordinary neglect; they are bound to use such diligence as every prudent man commonly takes of his own goods. *Ibid.*

41. The law implies an agreement, on the part of private

carriers for hire, to make good any losses arising from the negligence of their own servants. *Ibid.*

42. An express warranty by a private carrier for hire, that the goods shall go *safely*, merely puts him into the situation of a common carrier. *Ibid.*

BILLS OF EXCHANGE.

43. On Jan. 21, 1850, N., a purser in the Navy, in pursuance of instructions from the Navy Department, and by the command of Commodore Jones, then in command of the Pacific Squadron, drew, in California, a bill of exchange on the then Secretary of the Navy for $20,000, payable to the order of Com. Jones, Commander-in-Chief of the Pacific Squadron, at three days after sight. This bill was indorsed by Com. Jones to M. & Co., or order, who indorsed it to the order of the claimant. On April 5, the claimant presented the bill to the Secretary of the Navy at the Department, for acceptance. On April 10, it was returned to the claimant with the remark, "the Department declined to honor it." *It was not protested.* On Aug. 9, the petitioner was informed that the Department had decided to pay the draft, and its face was accordingly paid on that day, and the bill taken up by the Department. The petitioner claims 15 per cent. on the amount of the bill for re-exchange and interest, that being in California, in 1850, the rate of commercial damages upon protested inland bills of exchange. *Held:* The claimant is entitled to recover from the United States the sum of $3,396 66 damages on the bill for re-exchange and interest, with interest thereon from Aug. 9, 1850, till paid. Per Scarburgh, J. *Beers* v. *The United States.*

44. *Held*, also: the United States were parties to the bill both as drawers and drawees, and their interests were in no

way affected by the want either of a protest or of notice, which were wholly superfluous. *Ibid.*

45. *Held*, also, that upon the dishonor of the bill the United States, as drawers thereof, become liable to the holder for the principal sum and interest, and damages and expenses incurred by the dishonor, and this liability was not lost to the holder by his failure to have the bill protested, and to give notice of the dishonor. *Ibid.*

46. *Held*, also, that the liability of the United States for interest and damages upon the bill, was absolute and complete at the time the face of it was paid, and its mere surrender then was insufficient to discharge, release, or satisfy such liability for interest and damages. *Ibid.*

47. *Held*, also, that the damages on the bill, in lieu of re exchange, are to be ascertained by the law of the place where the bill was drawn, and the interest by the law of the place where the money was payable. *Ibid.*

48. When the United States, by their authorized officer, become a party to negotiable paper, they have all the rights and incur all the responsibility of individuals who are parties to such instruments. There is no difference except that the United States cannot be sued. *Ibid.*

49. The United States are liable, *it seems*, to damages on a protested bill of exchange drawn by them, in the same manner, and to the same extent, as an individual. *Ibid.*

50. When a bill of exchange is drawn by the United States, their contract is, *it seems*, that the drawee shall, on the bill being presented to him in a reasonable time from its date, accept the same, and having so accepted, shall pay it, when duly presented for payment according to its tenor. *Ibid*

51. As between the holder and drawer of a bill of exchange, protest and notice may, *it seems*, be dispensed with, where they must be unnecessary or immaterial to the drawer; where the drawer could sustain no injury by the neglect of the holder to make a protest, or give him notice of the dishonor of the bill; where the want of them could not possibly affect the drawer. *Ibid.*

52. The rule relating to bills of exchange, which requires a protest and notice in order to charge the drawer, is not one of positive law, but is founded in reason and the necessities of commerce. *Ibid.*

BOARDS OF COMMISSIONERS.

53. One J., in June, 1812, as alleged, was sole owner of the brig Jane of Philadelphia, which sailed from that port March 14, 1812, with a cargo bound to Laguayra, where she arrived in safety on April 14. From the distressed state of the country, her unlading was not completed until July 13. But in the meantime she had reloaded in part, and on July 21, was cleared at Laguayra for Philadelphia. She was prevented from sailing by an embargo laid by General Miranda. In consequence, from subsequent occurrences, the vessel was lost to the owners, and the cargo greatly injured. In January, 1822, J. filed his memorials before the Commissioners for adjudicating the claims of our citizens against Spain, for spoliations &c., appointed under the Treaty of February 22, 1819, demanding indemnity for losses sustained by him in consequence of the seizure, detention, and final loss of his vessel, and injury to her cargo by the Spanish authorities. The Board examined the memorials and the testimony adduced in support of the claim, and on November 18, 1823, came to the conclusion, and so ordered, that the claim be allowed as valid against Spain for the value of the vessel, for the necessary expenses

incurred in defending the property, and for the loss sustained upon the cargo; but on May 1, 1824, the Commissioners rescinded that decision, on the plea that the evidence was "not sufficient to establish the claim under the treaty." It appeared also, from minutes on the docket of the said Board of Commissioners, that J.'s claim was duly presented to the Board, and was disallowed, but no document could be found in the Department of State, stating the principle on which the decision was founded. The petitioners, representing the claim, allege that the Commissioners clearly erred in not allowing said claim, and that, too, without fault on the part of the claimant, whereby the United States became liable in $11,732 44; which sum they allege is unjustly detained from petitioners, and they ask judgment therefor against the United States. *Held:* the final decision of the Board of Commissioners, disallowing the claim, is a complete bar to the demand in this case. Per Blackford, J. *Thomas et al.* v. *The United States.*

54. Also, *held:* the question, whether the Board of Commissioners erred or not in their judgment in the case, is not for this court to determine: their decision must be taken to be correct. *Ibid.*

55. Also, *held:* the circumstance alleged, that the Board had, in the first instance, made an order in favor of the claim, is unimportant. The case remained after that order under the control of the Board, to be finally disposed of as, upon further reflection or information, they might think proper. *Ibid.*

56. Also, *held:* the final decision of the Board against the claim was rendered by a tribunal specially provided for by the treaty of 1819, for the adjudication of such claims, to which said claim was submitted by the claimant for decision; and from that decision there is no appeal. The judgment of the Board stands upon the same ground with the judgment of any judicial tribunal of exclusive jurisdiction. *Ibid.*

57. The petitioner R. and one Q., as alleged, were joint owners of the American brig Experiment, which was captured on her voyage from New York to Jamaica, in 1805, by a privateer bearing Spanish colors, and which was immediately thereafter re-captured by a British cruiser, and carried into Jamaica, and under a decree of the British court of Admiralty, upon a bill filed for salvage by the captors, was sold. The loss sustained by R. and Q., as also alleged, by the capture and detention of the ship, the salvage and other expenses, was, exclusive of interest, $9,235 44. That said capture was without any just cause, and was an infraction of the rights of the United States, as a neutral nation, and constituted a good claim for restitution against the government whose vessel the privateer was. The petitioner presented the claim for said loss before the Commissioners appointed under act of March 3, 1821, to carry into effect the treaty with Spain of 1819; but it was disallowed, on the ground, as alleged by the claimant, that the privateer was French and not Spanish. He subsequently brought said claim before the Board of Commissioners, appointed to carry into effect the treaty of 1831 with France, but that Board also refused to entertain it, on the ground, that the privateer making the capture was a Spanish and not a French vessel. As owner of one half of said claim, and administrator of Q., the owner of the other half, the petitioner claims that he is entitled to the judgment of this court, for the "amount of his loss, out of the treasury of the United States," as they, in their sovereign capacity, in the said treaties with France and Spain, "released those governments from all further reclamations and claims to indemnity than such as are therein provided for, of the like character as those therein provided for, and has thereby become responsible for claims of that character which have been excluded from the benefits of the provisions of said treaties." *Held:* the decisions of said Boards of Commissioners against the claim, like the judgment of a court of competent jurisdiction, are a bar to

the petition in this case for the same demand. Per Blackford, J. *Roberts* v. *the United States.*

58. Also, *held:* the claim having been disallowed by the Board of Commissioners under the treaty of 1819 with Spain, upon the ground, as alleged, that the privateer was French and not Spanish, was disallowed on the merits, because it was a disallowance on the ground that a fact material to the establishment of the claim was not proved. *Ibid.*

59. Also, *held:* the final decision of said Board against the claim, was rendered by a tribunal specially provided for by the treaty of 1819, for the adjudication of such claims, to which the claimant had submitted the case for decision, and from that decision there is no appeal given to any other tribunal. *Ibid.*

60. Also, *held:* the claim before the Board of Commissioners, under the convention with France of 1831, being for a French spoliation, could not be sustained without proof that the offending vessel was French; and the decision against the claim for the want, as alleged, of that proof, was a decision on the merits. *Ibid.*

61. Also, *held:* the Boards under the treaties, legally organized for the determination of such claims, having respectively, upon the application of the petitioner himself, examined his claim and decided against its validity, the fact, assumed by him, of the validity of the claim against either Spain or France, previously to the said treaties, does not exist. *Ibid.*

62. The decision, upon the law and facts, of the Secretary of the Treasury against a claimant, under Art. 9 of the treaty with Spain of 1819, is the decision of a competent tribunal of exclusive jurisdiction, and puts an end to the demand, both

as to principal and interest. It stands upon the same ground with the decision of a Board of Commissioners, appointed by or under a treaty, to determine upon the amount and validity of similar claims. Per Blackford, J. *Humphrey's Administratrix* v. *The United States.*

63. The disallowance, by Commissioners, of a claim, on the ground that a fact material to the establishment of the claim is not proved, is a disallowance on the merits. Per same. *Roberts* v. *The United States.*

64. When Congress has conferred upon an individual, or a board, or a department, the power to examine and decide a matter, and the matter has been decided, is such decision final?—*Quere.* Per Gilchrist, P. J.—*Wigg* v. *The United States.*

CAPTURE.

65. During the war between the United States and Tripoli, Lieut Decatur, in command of the Enterprise, boarded and destroyed the frigate Philadelphia, (which had been captured by the enemy, and was then moored in the harbor, under the batteries of Tripoli,) but under peremptory orders to set her on fire, and after blowing out her bottom, to abandon her. *Held:* these orders were inconsistent with and excluded the idea of a *capture;* the duty which he performed was that of her destruction, and not of her capture. Per same. *Decatur* v. *The United States.*

66. Section 5 of the act of April 23, 1800, is substantially a provision that the vessel is to be condemned, or that there is to be a legal adjudication that she is good prize, before the proceeds are to become the property of the captors. *Ibid.*

67. Property captured in war belongs, in the first instance,

to the nation; whatever right the captors acquire is derived by grant. The mere taking possession of the property does not of itself vest the title to it in the captors. *Ibid.*

68. As the title to the proceeds or value of a vessel as prize of war, depends on a grant, it must conform to the conditions of the grant; which are that the vessel, after having been captured, shall be brought into port and condemned as lawful prize. *Ibid.*

CENSUS MARSHALS.

69. Where the petitioner, appointed in June, 1850, assistant-marshal to take the seventh census, was, in consequence of an unforeseen and destructive calamity, (crevasses of the Mississippi,) put necessarily to *additional* labor and expense, in order to complete his duties, for which he claims that he is entitled to an increase of the compensation allowed by the act of May 23, 1850 (9 Stat. at Large, 428); *Held:* the claimant, in accepting the office of assistant-marshal, could have done so only on the terms which that act prescribed. Per Scarburgh, J. *Boyd* v. *The United States.*

70. He thereby undertook to perform the duties of his office of assistant-marshal for the compensation allowed by the said act of May 23, 1850, and exposed himself to its penalty, if without justifiable cause he should neglect or refuse to perform those duties. *Ibid.*

71. If the disaster, which added so much to his labors, and enhanced the incidental expenses of the performance of his duties as assistant-marshal, amounted to a justifiable cause for his neglecting or refusing to perform them, then he might, with impunity, have neglected or refused to perform those duties. *Ibid.*

72. But if, notwithstanding that disaster, he preferred fully to discharge his duties as assistant-marshal, he must be intended to have done so on the terms prescribed by law. *Ib.*

73 His having adopted that course, and in good faith discharged his duties under the disadvantageous circumstances which embarrassed him, however much it may redound to his credit and honor as a public officer, still creates no legal liability on the part of the United States to increase his compensation, or to reimburse him the additional incidental expenses to which he was subjected. *Ib.*

74. The law prescribed both his duties as assistant-marshal and the compensation to be allowed for their performance; and the claimant can have no legal demand beyond the terms of the law. *Ib.*

CHARTER-PARTY.

75. The petitioner, being her owner and master, in April, 1851, chartered the ship Ellen Brooks to the United States, by charter-party, to take in certain Government stores at Valparaiso, and "therewith proceed direct to Benicia, Upper California," and deliver the same at the expense of the charterers, and so end the voyage. The charter allowed the charterers ten working days to discharge the cargo, and contained the clause: "Penalty for non-performance of this charter-party, $4,000." The cargo was taken in and she proceeded, and arrived at Benicia July 8, 1851. The next day, the master reported her to the Commissary at that port as ready for delivery. He refused to receive the stores unless they were delivered at the Government hulk or port landing beyond the limits of Benicia, and nearly five miles from the western harbor, the usual place of anchorage and delivery of Benicia. This the master declined to do, on the grounds that

the charter-party only bound him to go to Benicia, and his vessel would not be safe at such port landing. But the agent of the Government persisting, on July 9 the master carried his vessel to the Government hulk, and again gave notice that he was ready to deliver cargo. The Collector demanded duties upon the stores, which being refused, he seized the ship, &c. This difficulty was not settled until July 17, when the delivery was commenced, and completed July 28. While discharging, the vessel became much injured by lying, with her cargo, on the rocks when the tide receded. He claims for the forfeiture of charter-party the $4,000. *Held:* the amount for non-performance, inserted in the charter-party, is to be treated as a mere penalty, and not as liquidated damages. Per Scarburgh, J. *Swain* v. *The United States.*

76. As to the $4,000 inserted as "penalty for non-performance," *held:* that the most the petitioner can claim is, that in this respect the charter-party constitutes a reciprocal undertaking between him and the United States, in the penalty of said sum, for the faithful performance of the charter-party by them respectively. *Ibid.*

77. The petitioner claims, also, the usual freight upon the stores, or cargo, from Benicia to the Government hulk, or "port-landing." *Held:* he was not bound by the charter-party to carry the stores beyond Benicia, and the failure of the United States to receive their goods at Benicia was a breach of the charter-party; therefore the petitioner is entitled to such extra freight. *Ibid.*

78. As to the damages which the petitioner sustained by the breach of the charter-party on the part of the United States, in failing to receive their goods at Benicia; *held:* he proceeded farther than Benicia in compliance with directions he was at full liberty to have disregarded. The damages subsequently sustained by him were neither incidental to, nor

caused by, such breach. The passing from Benicia to the port landing, resulted from the mutual consent of the United States and the petitioner, and its effect was to render his damages for the breach merely nominal. *Ibid.*

79. The direction given by the quarter-master to proceed from Benicia to the Government hulk and there deliver the stores, and the petitioner's consent to comply therewith, are to be regarded as a new contract entered into between him and the United States. By it, the hulk was substituted for Benicia, as the place of delivery. *Ibid.*

80. This new contract, however, did not deprive the United States of the benefit of the lay days for unloading, stipulated for in the original charter-party, nor did it relieve the Government from its obligation to effect the unloading within that time. *Ibid.*

81. Under this new contract the United States must be considered, by implication, as having agreed, not only to pay the at least usual freight from Benicia to the hulk, but also to compensate him for any injury his ship might actually sustain by being laid alongside of the hulk, and remaining there till the cargo was delivered. *Ibid.*

82. The interference of the Collector, whether legal or illegal, which prevented the unloading within the stipulated time, does not excuse the breach of that part of the contract. *Ibid.*

83. The United States required the petitioner to carry his vessel to the hulk, where injury to some extent was inevitable, as known to both parties, and an implication of anything less than a promise on their part to compensate him for any injury which she might actually sustain would not do him justice. His claim of compensation for injuries to his ship at the hulk is sustained by law. *Ibid.*

84. The penalty in a charter-party is not regarded as liquidated damages; and where the charter-party is not under seal, the penal clause is merely formal. *Ibid.*

CITIZEN.

85. Our government holds its public powers by no higher tenure than the citizen possesses his private rights; public powers are delegated, and private rights are possessed, by the will and assent of the people. Per Gilchrist, P. J. *Owners of the Brig Armstrong* v. *The United States.*

86. A private person, armed with no power of enforcing his rights, cannot speak in sufficiently impressive tones to insure his being heard by a foreign nation; his own government, in the discharge of that duty of protection which it owes to its citizens, *must speak for him.* *Ibid.*

87. *It seems*, if a citizen be spoliated by a foreign government, he is entitled to obtain redress from the foreign government through the means of his own government. *Ibid.*

88. If, in such case, from weakness, timidity, or any other cause on the part of his own government, no redress is obtained from the foreign government, then, *it seems*, the citizen has a claim against his own country. *Ibid.*

89. The doctrine that, whatever settlement our government may make, after interfering by request to procure redress for the injuries the claimant, a citizen, supposes himself to have sustained, it incurs no responsibility for the claim to such citizen, cannot be admitted. *Ibid.*

90. If the United States, in the plenitude of their power, see fit to submit the claim of a citizen to arbitration without

his assent, they should make the most careful and ample provision that he shall be fully and fairly heard, and that he shall have all reasonable opportunity to lay before the arbitrators the evidence on which he relies. *Ibid.*

91. Where the claim of a citizen is submitted by our government to arbitration, whether the matter in dispute is a question of law, or a mixed question of law and fact, the claimant has a right to be heard before the arbitrators. *Ibid.*

92. Our country is bound to protect our rights as individuals; and if this protection be not afforded us, she is bound to render us such an equivalent as it is in her power to bestow. *Ibid.*

93. If our country neglects the sacred duty of protecting the citizen in his rights, she is bound to make him compensation. *Ibid.*

94. Against another nation our country is bound to assert the claims of her citizens, for she alone can meet such an antagonist on equal terms. *Ibid.*

95. The government of the United States, *it seems*, has the power to submit to arbitration the claim of one of its own citizens upon a foreign government, which it has been prosecuting, in such a way as to preclude itself from pressing that claim upon such foreign government, or insisting upon it in any way as a cause of war, or a matter of national concern. *Ibid.*

96. There is a broad distinction between the submission to arbitration of a case involving national interests exclusively, and the submission to arbitration of a case relating to private rights alone, where the only matter of public concern is the general duty of a government to protect its citizens. *Ibid.*

97. Where a case relating to private rights alone is submitted by our government to arbitration, it must be done with a due regard to the rights of the citizen. *Ibid.*

98. If the rights of the citizen be disregarded and sacrificed, by submitting his case to arbitration, without a due regard to his rights, it is the dictate alike of law, common sense, and justice, that the government by which his rights have been sacrificed should make him restitution. *Ibid.*

99. By submitting to arbitration the *just* claim of a citizen, and thereby giving the arbitrator a discretionary authority to allow or reject it at his pleasure, the government puts it out of the power of the United States to perform that first and most sacred of duties, protection of the rights of the humblest citizen. *Ibid.*

100. Have the United States the right to submit to arbitration the claim of a citizen upon a foreign government without his assent or against his protest?—*Quere.* *Ibid.*

101. The consent of the citizen, in such a case of submission to arbitration, would estop him afterwards from objecting that such a submission was entered into. *Ibid.*

102. Where the claim of a citizen was submitted by our government to arbitration, because the respective governments could not agree upon the question of law, and the matter in dispute and submitted was the simple question of law, but that question was not determined at all, the award being founded solely upon the facts: "*Held*, the award is void (1), because it does *not* settle the matter in dispute, and the matter submitted, and (2), because it *does* settle the question of fact which was not submitted, and thus exceeds the submission." *Ibid.*

103. When our government submits the claim of a citizen upon a foreign power to arbitration, if he is not permitted a hearing, or to be represented before the arbitrator, and heard in defence of his rights, and the award is adverse to him, the United States become responsible to the claimant for the damages he sustains. *Ibid.*

104. The award, in such case, having been made against the United States, *they* are answerable to the claimant for the loss he has sustained, upon the principle that a nation, being entitled to the allegiance and obedience of its citizens, is solemnly bound, in return, to protect not only their persons but their property. *Ibid.*

105. Every party should have an opportunity to be heard before the tribunal that is to pass judgment on his rights. It is a principle of universal application, that no one shall be condemned unheard, and that every citizen, however humble, has a right to be heard in defence of his rights. *Ibid.*

106. It is on the duty of protection that the duty of allegiance depends. *Ibid.*

CLAIMS.

107. Previous to our treaty of 22d February, 1819, with Spain, a claim for the redress of the illegal seizure and condemnation of an American vessel by Spanish authorities, could be preferred only against the nation that had committed the injury. Per Blackford, J. *Thomas* v. *The United States.*

108. Where the petitioner claims a right of pre-emption to a tract of land, but admits there are claims thereto antagonistical to his, by parties who do not appear; *Held:* whether he is entitled to a right of pre-emption or not, cannot be de-

termined by this court without investigation, also, into such adverse claims. Per Gilchrist, P. J. *Hale* v. *The United States.*

109. Where a right to enter certain land by pre-emption is asserted, but the court is informed that there are three several claimants thereto; *Held:* this court cannot decide that the claim of the petitioners is the better claim, where the other claimants are not represented, and have had no opportunity of proving that a decision ought not to be made in favor of the petitioner. *Ibid.*

CLERKS.

110. The claimant, while chief clerk in the Treasury Department, at different periods between April 24, 1829, and May 31, 1833, acted as Secretary of the Treasury, performing the duties of the office, by authority of the President of the United States, on account of the absence from the seat of government or sickness of the Secretary of the Treasury. *Held:* the claimant, at the times he so performed the duties of Secretary of the Treasury, held an office separate from his office of chief clerk—that is, held two offices, there being at the time no law to prohibit him from doing so; and as he discharged the duties of both offices, is entitled to compensation accordingly. Per Blackford, J. *Dickens* v. *The United States.*

111. *It seems,* proof of voluntary services as extra clerk in a "department, bureau or office at the seat of government," rendered with the knowledge of an agent of the government, authorized by law to assent either expressly or impliedly to the performance of those services, will sustain a claim for compensation against the United States. Per Same. *McElderry* v. *The United States.*

112. Where such voluntary services as extra clerk are performed, but not "with the knowledge of an agent of the government authorized by law to assent either expressly or impliedly to the performance of those services," *Held:* there exists no claim for compensation against, or contract with, the United States. *Ibid.*

113. No one but the head of a department, bureau or office at the seat of government, can, under any circumstances, contract for the services of an extra clerk, on account of the government, in such department, bureau or office. *Ibid.*

114. It seems the head of a department, bureau or office at the seat of government, can contract for the services of an extra clerk in such department, bureau or office, only during the session of Congress, or when the services of such extra clerk are indispensably necessary to enable such department, bureau or office to answer some call made by either House of Congress at one session to be answered at another. *Ibid.*

115. It seems a contract for services as extra clerk in a department, bureau or office at the seat of government, entered into by the head of such department, bureau or office, not in accordance with the provisions of the special appropriation act of August 26, 1842, Sec. 15 (5 Stat. at Large, 526), is in violation of such act, and void as against the United States. *Ibid.*

116. The claimant, while Chief Clerk in the State Department, at different periods between Aug. 10, 1833, and Nov. 9, 1836, was Acting Secretary of State, performing the duties of the office by authority of the President of the United States, on account of the absence or sickness of the Secretary of State. *Held:* the claimant at the times he so performed the duties of Secretary of State, held an office separate from his office of Chief Clerk; that is, held two offices,—and as he dis-

charged the duties of both is entitled to compensation accordingly. Per Same. *Dickins* v. *The United States.*

COMMUTATION.

117. An officer entitled to the benefit of the provision of the Resolution of Congress of Jan. 17, 1781, extending the grant of half-pay for life to the officers of the hospital department and medical staff, received under special Act of June 23, 1836, (6 Stat. at Large, 641) five years full pay, as commutation for his half-pay for life under the Resolution of Congress of March 22, 1783. *Held:* this was not a final settlement of his claim for half-pay; the payment of a sum of money not being of itself a discharge of a debt for a larger amount, and here there was no compromise. One party (the United States) to a contract cannot, without the assent of the other, discharge a debt by the payment of a smaller sum than the amount due. Per Gilchrist, P. J. *Baird* v. *The United States.*

CONSTRUCTION.

118. If a claim be alleged to be "founded upon any law of Congress," this Court will construe such law and ascertain its meaning by applying to it those rules of construction which a wise and long-continued experience has determined to be the best adapted to that purpose. Per Same. *Todd* v. *The United States.*

119. Section 1st of the Act of April 21, 1808, (2 Stat. at Large, 484,) declares a contract with the United States, in which any member of Congress is interested, to be "absolutely void and of no effect:" Sec. 3 of the same act merely directs, that in every such contract there shall be inserted a provision that no member of Congress shall be interested in it, but does not declare the contract to be void if such provision is not in-

serted. *Held:* the third section is *directory*, and an omission to insert the provision does not render the contract void. Per Same. *Crown* v. *The United States.*

120. By the Act of March 3, 1853, (10 Stat. at Large 748,) Sec. 1st, it was enacted "that the proper accounting officers, under the direction of the Secretary of the Treasury, adjust and settle the claims of ——, deceased, for losses sustained by him while retained as a hostage by the British officers during the war of the Revolution."

Sec. 2d directed the said officers in the adjustment to allow $37,197, with legal interest from March 4, 1850, until the day of stating the account of said losses. The 3d and last section authorized the Secretary of the Treasury to pay to the claimant, grandson of deceased, "the amount that shall be ascertained to be due on account of said losses, including the interest," &c. In construing this Act, the officers of the Treasury refused to pay anything beyond the sum named in Sec. 2, with the interest there allowed; declining "to adjust and settle" the said claims, or to ascertain "the amount due on account of said losses." On the hearing, it was contended for the government, that the 1st Sec. of the Act was intended merely to state the grounds on which the allowance was to be made; that the 2d Sec. was meant to declare and limit the amount to be paid; that Sec. 3 was intended only to provide that the sum specified should be paid to the claimant, and that the whole duty of the Secretary was performed by paying the $37,197, with the interest thereon. *Held:* there is no rule of construction which gives authority to say, that the words in Sec. 2, which expressly provide that the accounting officers of the treasury shall "adjust and settle" the claims of ——, had no meaning, and that Congress did not intend that the claims should be adjusted and settled by the accounting officers. Per Same. *Wigg* v. *The United States.*

121. Also, *Held:* the 2d Sec. of the Act is not a mere pro-

vision for the payment of the sum specified. It implies that Sec. 1 requires something to be done, because $37,197 is to be allowed "in the adjustment of said losses," which, by Sec 1, were to be adjusted and settled. *Ibid.*

122. Also, *Held:* unless this adjustment were to be made, there would be no means of determining the amount of the interest, for that is to be cast "until the day of stating the account of said losses." *Ibid.*

123. Also, *Held:* the 2d Sec. intends that when the losses are adjusted, in the adjustment the $37,197 shall be allowed; but it does not exclude losses exceeding that sum, if such be satisfactorily proved. *Ibid.*

124. Also, *Held:* the 3d Sec., in addition to pointing out the person who is to receive the money, provides that the sum to be paid him shall be "the amount that shall be ascertained to be due on account of said losses." It is evident that Congress did not intend that merely the sum of $37,197 should be paid. *Ibid.*

125. Also, *Held:* the Act requires that the claims of —— should be adjusted and settled at the treasury; that, in the adjustment, the sum of $37,197 should be allowed; that it is only in this mode that the interest can be computed; that, when the amount is ascertained to be due, it shall be paid to the claimant; and it is only upon this construction that the whole object of the Act can be accomplished. *Ibid.*

126. If a contract with the government is susceptible of two constructions, one consistent and the other inconsistent with the act of Congress authorizing such contract, the former construction must be adopted. Per Scarburgh, J. *Gibbons et al.* v. *The United States.*

127. The act of August 23, 1842, (5 Stat. at large, 510,) does not apply *only* to the departments of the government.

The language of that act is general, and this court has no authority to limit its operation. Per Blackford, J. *Holman's administrator* v. *The United States.*

128. The language of each of the acts of March 3, 1839, (5 Stat. at Large, 349,) of August 23, 1842, (5 Stat. at Large, 510,) and of August 26, 1842, (5 Stat. at Large, 525,) is broad and comprehensive enough to include both an assistant messenger and a laborer. Per Scarburgh, J. *White and Sherwood* v. *The United States.*

129. Neither an "assistant messenger," nor a "laborer," comes within the exception to the act of August 26, 1842, sec. 11: that exception extends only to "watchmen and messengers." The office of assistant-messenger is wholly distinct from that of either a messenger or a watchman, and a laborer is neither the one nor the other. *Ibid.*

130. Where the claimant, in May and June, 1853, rendered services in the office of Fourth Auditor of the Treasury, although he was not employed by the head of the department, but voluntarily tendered his services, and was merely permitted by the Auditor to perform them in his office; *Held:* this is not to be considered as an employment in the sense of the Act of August 26, 1842, sec. 15, (5 Stat. at Large, 526,) and for that reason no legal liability, on the part of the United States, to make the petitioner compensation for his services can result from it. Per Same. *Boyd* v. *The United States.*

131. To "adopt" a route for the transportation of the mail, means to take the steps necessary to cause the mail to be transported over that route. That is the sense, so far, of the resolution of Congress of May 24, 1828, (4 Stat. at Large, 322.) Per Gilchrist, P. J. *Rhodes* v. *The United States.*

132. The object of Sec. 12 of the act of August 26, 1846,

(5 Stat. at Large, 536,) modifying the act of March 3, 1835, is merely to require that the order (not required to be given by said act of March 3, 1835) authorizing any officer to perform the duties of a higher grade, shall have been given previously to the performance of such duties, but need not be in writing. Per Same. *Magruder* v. *The United States.* Second Opinion.

133. *It seems*, the court will review the construction given to a statute by the accounting officers of the Treasury in the discharge of official duty, where they have *declined to act* under it, even in a matter specially referred by act of Congress to be adjusted by them. Per Gilchrist, P. J. *Wigg* v. *The United States.*

CONTRACTS.

I. Construction of Contracts.

134. In January, 1826, Captain Blaney, superintending the fortifications at Oak Island, near the mouth of Cape Fear River, issued proposals for the delivery at Oak Island of six millions of brick. The claimant filed his proposals for delivering from one to six millions of brick, of certain sizes, at $7 75 per thousand. On March 16, the proposals were accepted by B., between whom, acting for the Government, and the claimant, a contract under seal was then executed. This was forwarded to the Engineer Department. On July 26, that Department wrote to B. that the contract was

"decidedly objectionable," stating certain objections; (1) that there was no penalty expressed in, and no bond as security accompanying and referring to, the contract; (2) "that if the whole [of the bricks] should not be delivered, the Government is bound, nevertheless, to pay the sum to which it would amount if delivered—at least, according to the letter of the contract, that construction might be put upon it;" (3) that "the aid the Government stipulates to furnish in the reception of the bricks is too indefinitely stated." Upon these objections the Engineer Department pronounced the contract "a nullity." By it the claimant was to furnish one million bricks on or before October 1, 1826. He was not bound to deliver them before that time, but he had a right to do so if he chose, and to receive the contract price for them, $7 75 per thousand. There was no agreement between the claimant and B. that the contract might be altered, modified, or rescinded by either party, or that its approval by any superior officer was necessary. After receiving the communication from the department, and before October 1, 1826, B. refused absolutely to receive any bricks of the claimant, or to fulfil the contract. It appeared in evidence that the claimant had then on hand 500,000 bricks, for which he should have been paid $3,875 under his contract; that he became embarrassed in consequence of such refusal, and was compelled to sell out to one P., previously to such refusal his creditor, from whom subsequently B. purchased the very bricks made by the claimant in fulfilment of his contract, at the increased price of $8 50 per thousand. The petitioner claims damages. *Held:* The contract was a valid one, and the conclusion of the Engineer Department that it was a nullity, was unauthorized by law or any regulation or "usage" of the Department. Per Gilchrist, P. J. *Crown* v. *The United States.*

135. *Held*, also, that B. had no right to rescind the contract before Oct. 1, 1826, the earliest time at which the claimant was bound under it to deliver the bricks. *Ibid.*

136. *Held*, also, that the belief (alleged) of B., that the claimant was unable to fulfil the contract, was no reason for rescinding it before Oct. 1, 1826. *Ibid.*

137. *Held*, also: the claimant had a right to be paid for such bricks as he should deliver under the contract before Oct. 1, 1826; and, as he had on hand, ready for delivery, at the time of the refusal by Capt. B. to fulfil the contract, 500,000 bricks, for which he should have been paid $3,875 under it, he is entitled to judgment against the United States for that amount, deducting therefrom $375, the estimated expense of transportation to Oak Island, at 75 cents per thousand. *Ibid.*

138. As to the sheds, kiln-walls, moulds, &c., sold, as appeared in evidence, to P. by the claimant, *Held:* even if they were sold "through an oppressive course of conduct by P., and even if Capt. B. was privy to it," the United States are not therefore legally answerable to the claimant. *Ibid.*

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139. As to the loss of his prospective profits, which the claimant estimates at $4,000; *Held:* it is in evidence that he was embarrassed, and the Court cannot say that the claimant would have been able to go on with his contract, even if he had been paid for the bricks which were ready to be delivered. Such profits are not allowed him. *Ibid.*

140. As to the objection to the contract by the Engineer Department, that "the aid the Government (thereby) stipulated to furnish in the reception of the bricks is too indefinitely stated;" *Held:* as the contract provides that "the United States are to furnish hands to receive the bricks as they shall be tossed or thrown from the vessel by the contractor," they were to furnish hands enough to perform the duty. *Ibid.*

II. Contracts under Treaties.

141. "When the terms of a treaty stipulation import a contract—when either of the parties thereby engages to perform a particular act, the treaty addresses itself to the political, not to the judicial department, and the Legislature must execute the contract before it can become a rule for the Court." Per Blackford, J. *Humphrey's Administratrix* v. *The United States.*

III. Law of Carriers.

142. Under a contract as private carrier for hire to carry and deliver, the law only implies the promise to use ordinary diligence. Per Scarburgh, J. *Gibbons et al.* v. *The United States.*

143. The law implies an agreement on the part of private carriers for hire to make good any losses arising from the negligence of their own servants. *Ibid.*

IV. Contracts by Statute.

144. The act of 31st January, 1828, (3 Stat. at Large, 723,) "concerning the disbursement of public money," forbids *advances* of public money in *all* cases; but on contracts for the performance of any service for, or the delivery of articles of any description for the use of the United States, it allows *payment* to be made not exceeding the value of the service rendered, or of the articles delivered *previously* to such payment. Per Scarburgh, J. *Gibbons et al.* v. *The United States.*

145. An *advance* of money on contract, strictly speaking, is a payment made before an equivalent is received. It is such an advance that is forbidden by the act of 31st January, 1823. *Ibid.*

146. The "payment" which the act of 31st January,

1823, contemplates, is a payment for a full equivalent received, as contradistinguished from a payment for an equivalent expected. The former it allows, the latter it forbids. *Ibid.*

147. The act of 31st January, 1823, prescribes three requisites to constitute a valid payment: 1st, that it be a payment in the sense of the statute; 2d, that it be made in a case of contract for the performance of some service for, or the delivery of articles of some description for the use of the United States; and, 3d, that it shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. *Ibid.*

148. *It seems*, the Navy Commissioners, constituted by the act of February 7, 1815, acting under the superintendence of the Secretary of the Navy, had authority, by the act of March 3, 1839, (5 Stat. at Large, 339,) to make a contract for "blank-books, contracts and bonds," at specified prices, for the use of the office of the Board, as it was part of the ministerial duties of their office, and was a matter "connected with the Naval establishment of the United States." Per Gilchrist, P. J. *Gideon* v. *The United States.*

149. *It seems*, contracts made under the authority of the Navy Commissioners, unfulfilled at the time of the passage of the act of August 31, 1842, were not abrogated by the operation of that act, but remained in force under it. *Ibid.*

150. Where a contract, entered into by the Board of Navy Commissioners, valid at the time it was made, remained unfulfilled at the passage of the act of August 31, 1842; *Held:* the United States could not put an end to such contract, either by an act of Congress or through the agency of the Navy Department, without being responsible to the other contracting party for the damages he sustained thereby. *Ibid.*

151. Where the petitioner, appointed in June, 1850, assistant-marshal to take the seventh census, was, in consequence of an unforeseen and destructive calamity (crevasses of the Mississippi) put necessarily to *additional* labor and expense in order to complete his duties, for which he claims that he is entitled to an increase of the compensation allowed by the act of May 23, 1850 (9 Stat. at Large, 428); *Held:* the claimant, in accepting the office of assistant-marshal, could have done so only on the terms which that act prescribed. Per Scarburgh, J. *Boyd* v. *The United States.*

152. He thereby undertook to perform the duties of his office of assistant-marshal, for the compensation allowed by the said act of May 23, 1850, and exposed himself to its penalty, if without justifiable cause he should neglect or refuse to perform those duties. *Ibid.*

153. As to changes in a contract which necessarily imply an increased price, and which are assented to by the employer, the principle governs that he is not bound to pay for services according to the usual rate of charging therefor, with no reference to the contract, but must pay for them only according to the rate of the contract. This is the rule of compensation stated, in explicit terms, in Sec. 23 of act of July 2, 1836, relating to the Post-Office Department. Per Gilchrist, P. J. *Huston* v. *The United States.*

154. The 23d section of the act of July 2, 1836 (5 Stat. at Large, 85), does not, either in its letter or its spirit, provide that no claim for extra allowances should be valid against the United States unless *an order* for additional service was made by the Postmaster-General. *Ibid.*

155. As the Postmaster-General, under Sec. 23 of the act of July 2, 1836, might make temporary express contracts, the United States might then be bound by the obligation of an

implied contract for carrying the mail, proved in such a way as is recognized by the rules of law to be binding upon individuals. *Ibid.*

156. Section 1st of the act of April 21, 1808 (2 Stat. at Large, 484), declares a contract with the United States, in which any member of Congress is interested, to be "absolutely void and of no effect." Sec. 3 of the same act merely directs, that in every such contract there shall be inserted a provision that no member of Congress shall be interested in it, but does not declare the contract to be void if such provision is not inserted; *Held:* the third section is *directory*, and an omission to insert the provision does not render the contract void. Per same. *Crown* v. *The United States.*

V. Contracts Generally.

157. If a contract with the government be the foundation of the claim, this court will determine the nature and validity of such contract, by the application thereto of known and well-settled principles of law. Per Gilchrist, P. J. *Todd* v. *The United States.*

158. *It seems*, this court will entertain the petition of one *not a citizen*, and grant him relief upon a claim arising on contract with the United States. Per Gilchrist, P. J. *Porte* v. *The United States.*

159. If a contract with the government is susceptible of two constructions, one consistent and the other inconsistent with the act of Congress authorizing such contract, the former construction must be adopted. Per Scarburgh, J. *Gibbons et al.* v. *The United States.*

160. The ordinary principles of law and morality, which are applied to regulate the dealings of individuals, are appli-

cable in transactions between the United States and their citizens. Per Gilchrist, P. J. *White* v. *The United States.*

161. No one can make another person his debtor without the consent of such other person; the law is the same as regards the government. Per Blackford, J. *McElderry* v. *The United States.*

162. Where a contract for services is entered into by an agent of the United States, duly authorized to make it, whatever such agent lawfully does within the scope of his authority, is done by the United States. Per Scarburgh, J. *Ericsson* v. *The United States.*

163. In a claim for work done for, or services rendered, the United States, the law, *it seems*, from the circumstances of (1) an executed consideration—the work done by the claimant, and (2) a request by the United States for the consideration previous to its being done, will imply a promise by the United States to pay such claimant for the work whatever it may reasonably be worth. *Ibid.*

164. Where money is paid to an agent for his principal, under such circumstances as would entitle the person making the payment to recover it back from the principal, if it had been paid directly to him, a suit may be maintained therefor against the agent, if, before he pays the money to his principal, notice is given to the agent that it will be reclaimed from him. Such notice (or *protest* as in the case of payment of unascertained duties) does not create the right to recover back the money; that results from other circumstances. The notice is necessary only because the agent is not liable in an action by the person who has mispaid the money, if he has paid it over to his principal without such notice. Per Scarburgh, J. *Wood* v. *The United States.*

165. In all suits for personal services, it must appear that there was an express or implied contract. Per Blackford, J. *McElderry* v. *The United States.*

166. A mere voluntary courtesy will not support even an express promise to pay. *Ibid.*

167. One may be liable for work done for him, although the claim for compensation depends alone on the fact that he knew of the work while it was progressing and made no objection; there the law implies an assent. *Ibid.*

168. Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy even, the law will excuse him. Per Scarburgh, J. *Gibbons et al.* v. *The United States.*

169. When a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. *Ibid.*

170. The principle never obtained, under any system of jurisprudence, that would enable one party to a contract to rescind it, of his own mere will, without responsibility for the damages the other contracting party thereby sustained. Per Gilchrist, P. J. *Gideon* v. *The United States.*

171. What the law looks to, in the case of an implied contract, is not the agreement of the parties, but their circumstances or acts; and from these circumstances or acts the law raises the duty and implies the promise, by which the party will be bound. Per same. *Huston* v. *The United States.*

172. In the case of an express contract the law measures

the extent of each party's duty by the terms to which he has expressly agreed. *Ibid.*

173. In the case of an implied contract, the terms are such as reason and justice dictate in the particular case, and which, therefore, the law presumes that every man undertakes to perform. *Ibid.*

174. Where the changes in a contract necessarily imply an increased price, and the employer expressly authorizes, or silently, but with full knowledge, assents to them, he is then bound to pay it. *Ibid.*

175. A *gift* of what is due on a contract cannot be made to the person who owes it, otherwise than by a release under seal. Per Scarburgh, J. *Wood* v. *The United States.*

176. If part of a debt be paid, and the creditor give a receipt expressing that the money is received in full of all demands, still, *it seems*, the obligation to pay the balance will remain wholly unaffected, unless there be some additional consideration to discharge it. *Ibid.*

177. In every sale of personal property, except a judicial sale, there is implied warranty of title or of peaceable possession. Per Gilchrist, P. J. *Porte* v. *The United States.*

178. No penal condition or understanding, collateral to a contract under seal, can have any effect upon it. Per same. *Crown* v. *The United States.*

179. There is no rule of law or equity which authorizes one party to put an end to a contract, where the other party is not in fault. Per same. *Gideon* v. *The United States.*

180. Where money is paid under an actual mistake of the

law, made directly with reference to the law itself, the payment, *it seems*, is not voluntary, or a gift to the party receiving it. Per Scarburgh, J. *Sturges et al.* v. *The United States.* Second opinion.

181. There is, *it seems*, a clear and practical distinction between *ignorance* and *mistake* of the law, founded in reason and justice, and sustained by eminent authority. *Ibid.*

VI. Contracts with Government.

182. Where an importer at the time of the passage of the act establishing this Court, had a just claim against the United States for money paid them by mistake for duties not imposed by law, but no enforceable remedy for its recovery, and had, by reason of the very mistake under which the payment was made, lost his remedy against the collector, and the Secretary of the Treasury had decided that his claim was "inadmissible under the laws;" *Held:* his right to petition Congress still remained in unimpaired vigor, and his claim, as at its origin, still rested on an implied contract on the part of the United States to repay him the money. Per Scarburgh, J. *Beatty's executor* v. *The United States.*

183. This money was his property, not theirs; and the United States were obliged, by the ties of natural justice and equity, to refund it; and being so obliged, the law, according to principles universally acknowledged, implied a promise on their part to pay it to him. *Ibid.*

184. His claim for the money, as a claim founded on an implied contract with the United States, comes within the very words of the act constituting this court, and is one of the cases for which it was designed to provide; and therefore

the claimant's right to relief in this court is unquestionable. *Ibid.*

185. Where, during the military occupation of Mexico in 1847, our officer commanding at Puebla ordered a sale at auction of captured tobacco, and the same was advertised and sold accordingly, and subsequently delivered and paid for; *held:* there were all the elements necessary to constitute a contract, and with the United States. Per Gilchrist, P. J. *Porte* v. *The United States.*

186. After such sale and payment by the vendee, the United States had no greater right to take the property again into their possession, without indemnifying those who might have a claim to it, than any individual would have to take property from his vendee on the ground that he, the vendor, had no right to sell it. *Ibid.*

187. There is no reason why the United States should stand in any better position, in regard to property in their possession, than a private citizen. *Ibid.*

188. A sale by the United States, acting through their officers, in an enemy's country, of personal property in their possession, to which they claim a title by the rights of war, is not a judicial sale or made by authority of a court. For the purposes of such a sale, the officers making it are not to be regarded as a court of law or officers of a court. *Ibid.*

189. There is no principle which would authorize the government to terminate a contract, which would not apply to those persons with whom the government might have contracted. Per same. *Gideon* v. *The United States.*

190. Where the claimant, for the period from 1st November, 1848, to June 30 1850, carried the mail under a contract

with the Government, by which the sum of $6,894 per year was paid for transporting it from Houston to Sabinetown, semi-weekly, in two-horse coaches, but the service was in fact performed by him in four-horse coaches, and it was necessary, owing to the condition of the roads and water-courses, that four-horse coaches should be used for that purpose, and the Post Office Department knew that the mail was so carried by the claimant in four instead of two-horse coaches, and made no objection; *Held:* the claimant is entitled to compensation from the United States for the extra service, over and above the sum allowed by his contract. Per same. *Huston* v. *The United States.*

191. Where the claimant, a commander, actually performed the duties of a captain in the navy, for the period from April 18, 1833, to June 28, 1840, by competent authority; *Held:* he is legally entitled to the sum of $3,830 12, the pay of a captain for that period. Per same. *Magruder* v. *The United States.*

192. Wherever there is a duty there is a corresponding obligation to perform it. Duty creates the obligation to pay back money illegally exacted by the Government for duties, and from this obligation the law implies a promise on the part of the United States to repay it. Per Scarburgh, J. *Spence and Reid* v. *The United States.*

193. An officer entitled to the benefit of the provision of the Resolution of Congress of Jan. 17, 1781, extending the grant of half-pay for life to the officers of the hospital department and medical staff, received under special Act of June 23, 1836, (6 Stat. at Large, 641,) five years full pay, as commutation for his half-pay for life under the Resolution of Congress of March 22, 1783. *Held:* this was not a final settlement of his claim for half-pay; the payment of a sum of money not being of itself a discharge of a debt for a larger

amount, and here there was no compromise. One party (the United States) to a contract cannot, without the assent of the other, discharge a debt by the payment of a smaller sum than the amount due. Per Same. *Baird* v. *The United States.*

194. The law which, in raising a contract by implication, proceeds upon the assumption that each party was influenced by a desire to act with entire fairness, without the slightest advantage on either side, applies with peculiar emphasis to a contract between the United States and a private person. Per Same. *Swain* v. *The United States.*

195. Where a contract for services is entered into by an agent of the United States, duly authorized to make it, whatever such agent lawfully does within the scope of his authority, is done by the United States. Per Same. *Ericsson* v. *The United States.*

196. In a claim for work done for, or services rendered, the United States, the law, *it seems*, from the circumstances of (1) an executed consideration—the work done by the claimant, and (2) a request by the United States for the consideration previous to its being done, will imply a promise by the United States to pay such claimant for the work whatever it may reasonably be worth. *Ibid.*

197. *It seems*, the assignment and delivery to the United States of the bill of lading and policy of insurance are equivalent to and in effect a delivery to them of articles shipped. Per Same. *Gibbons et al.* v. *The United States.*

198. The claimant G. and another, L., in 1817, were contractors on the Cumberland road. During the progress of the work, the Superintendent determined to alter the plan for making the road, and directed the contractors, L. and G., to conform to his new plan, thereby increasing the expenses of

the work performed by them, assuring them that the United States would compensate them therefor. L. and G. constructed their part of the road agreeably to such directions of the Superintendent. The special act for their relief of 1848 (9 Stat. at Large, 711), authorized the Secretary of the Treasury "to settle upon principles of equity the accounts of" L. and G., &c. The balance allowed and paid them under said Act was $3,931 71. The petitioner claims from the United States interest on that sum from the time when the work was done in 1817 to the present. *Held:* The Court has no jurisdiction in the case, and the claimant is not legally entitled to recover. Per Blackford, J. *Gay* v. *The United States.*

199. *Held*: also, the circumstance that by the special Act of 1848 the Secretary was to settle the account upon the principles of equity, did not necessarily require that interest should be allowed upon the sum found due L. and G. *Ibid.*

200. In 1828, a Special Term of the Circuit Court of the United States was held at Prairie du Chien, in Michigan, for the trial of Indians charged with the murder of some white men. A Mr. S., of Missouri, was retained by the War Department to appear for the Government on the trial. The services of an interpreter on the trial were necessary. Mr. S. procured the claimant, from Missouri, to act as interpreter. He performed the duty satisfactorily. Without a skilful interpreter the cause could not have been tried. *Held:* the claimant has a legal cause of action against the United States to recover for his services as interpreter. Mr. S., in employing him, did not exceed his authority; if he had not done so, he could not have fulfilled the trust reposed in him as counsel, by the department. Per Same. *Shaw* v. *The United States.*

THE CUSTOMS.

I. Unascertained Duties—Protest—Action against the Collector
II. Duties on deficiencies—Warehoused goods—Mistake of law and fact—Voluntary Payments.
III. Form, object and effect of protest—Payment of duties under mistake of fact.
IV. Invoice value or price—Penal Duties—Duties illegally exacted.
V. Voluntary Payments—Failure to Protest.

I. Unascertained Duties—Protest—Action against the Collector.

201. Prior to act of March 3, 1839 (5 Stat. at Large, 348), an importer might maintain an action against a collector for the recovery of the excess of duties illegally exacted; (1) where the payment was made for unascertained or estimated duties, and (2) when it was made under protest. Per Scarburgh, J. *Sturges et al.* v. *The United States.**

202. The effect of Section 2 of said act of March 3, 1839, was to take away the right of action, as against collectors, to recover back; (1) where the payment was made for unascertained or estimated duties, and (2) when it was made under protest. *Ibid.*

203. By way of compensation to the importer for the loss of his remedy by action, Section 2 of the act of March 3, 1839, made it the duty of the Secretary of the Treasury, where it should be shown to his satisfaction that, in any case of unascertained duties, or duties paid under protest, more money had been paid to the collector than the law required to be paid, to take the prescribed measures to have it refunded to the person entitled to the over-payment. *Ibid.*

* A synopsis, as well as digest, is given of this opinion, as it is a highly important one; so as to put the reader in possession of the argument.

204. The second section of the act of March 3, 1839, did not in any way affect or propose to affect, the right of a party making an over-payment, in any case therein mentioned, to repayment. *Ibid.*

205. The power conferred upon the Secretary of the Treasury by Section 2 of the act of March 3, 1839, was purely *administrative*, and in no sense judicial. *Ibid.*

206. Where, under Section 2 of act of March 3, 1839, an importer, in a case of unascertained duties, or of duties paid under protest, paid to the collector more money than he was by law required to pay, but could not show *to the satisfaction* of the Secretary of the Treasury that he had done so, he was, before the institution of this court, without any enforceable remedy. *Ibid.*

207. The action of the Secretary of the Treasury, under section 2 of the act of March 3, 1839, not being judicial, but merely administrative, the implied contract of the United States to refund to the importer what had been taken or detained from him without authority of law, although he could not show to the satisfaction of the Secretary that he had paid more than he was by law required to pay, and was without an enforceable remedy, still remained unsatisfied and undischarged. *Ibid.*

208. Under the act of March 3, 1839, Section 2 (still so far in force), it was competent for the Secretary of the Treasury, if it was shown to his satisfaction that more money had been paid to the collector than the law required to be paid, to take the measures presented by that act to have it refunded to the importer. *Ibid.*

209. The act of March 3, 1839, did not vest the Secretary of the Treasury with the power of deciding upon the rights

of claimants for return of duties, except to the extent that he might be required to act upon those rights. *Ibid.*

210. The act of March 3, 1839, made it a condition precedent to the importer's right to the Secretary's warrant upon the Treasury for over-payments, that he should satisfy the Secretary that his claim belonged to one of the classes mentioned in the act, and was well founded. *Ibid.*

211. It was not designed that the importer, under the act of March 3, 1839, should obtain relief from the Secretary of the Treasury, a ministerial officer, unless his case *was shown* to be one on which such officer could act with entire safety to the public interests. *Ibid.*

212. If the importer failed to show such a case, then he failed to obtain the benefit of the statutory remedy; but it was not designed that his rights should be otherwise affected. *Ibid.*

213. If the importer failed to show such a case, the implied contract of the United States, in a case of unascertained duties, to refund the over-payment, would still continue in full vigor, and *it seems* the importer has a remedy by appeal to this court. *Ibid.*

214. The decision of the Secretary of the Treasury, under the act of March 3, 1839, affected merely his own official action, and nothing more. *Ibid.*

215. The explanatory act of February 26, 1845 (5 Stat. at Large, 727), restored *sub modo* the right of action against a collector in cases of duties paid under protest. *Ibid.*

216. The explanatory act of February 26, 1845, is silent upon the subject of unascertained duties, and is therefore

wholly inapplicable to them, and the rights of an importer in reference to unascertained duties remained the same after as they were before the passage of that act. *Ibid.*

217. The act to refund excess of duties, &c., of August 8, 1846, Sec. 2, has no application to unascertained duties; it in terms applies only to duties illegally exacted. *Ibid.*

218. "Unascertained duties," in the strict legal sense of the terms employed in the act of August 8, 1846, are not illegally exacted; there can be no illegality as respects them, except in the detention of over-payment after the true amount of duties has been legally ascertained. *Ibid.*

219. "Unascertained duties" are demanded and paid in strict conformity to law; the very terms of the act imply that duties are, to some extent, imposed and payable in the particular case, but that the true amount is unknown and unascertained at the time of payment. *Ibid.*

220. Payment of "unascertained duties" is made under an implied contract on the part of the United States, that the excess, if any, beyond the amount of duties actually imposed by law, shall be refunded to the importer. *Ibid.*

221. Where, during the years 1847–'8–'9–'50, certain parties imported brandies and other liquors in casks, and paid duties thereon, not only upon the value of the quantity ascertained by gauger's return, but also upon leakage during the voyage of importation, though not occurring from accident at sea; that is, paid the duties as *per* invoice and not by gauge; *held:* it was, in its nature, a case of "unascertained duties." *Ibid.*

222. The regulation of the Treasury Department, by which duties on imported liquors were required to be computed on the *invoice* quantity, was in conflict with law and invalid. *Ibid.*

223. Although the Secretary of the Treasury, in the exercise of his discretion, may adopt necessary forms and modes of giving effect to the law, yet neither he nor those who act under him can dispense with or alter any of its provisions. *Ibid.*

224. Importers, in cases of doubt, are entitled to have their rights settled by the judicial exposition of the laws rather than by the views of the Department. *Ibid.*

225. As between officers of the customs and the importers, it is well settled that the legality of all the doings of the former may be revised in the judicial tribunals. *Ibid.*

226. Where duties are, in their nature, under the Acts of Congress, *unascertained* at the time of their payment, no regulation of the Treasury Department can deprive the importer of the right vested in him by law, so to consider and treat them. *Ibid.*

227. Under "An Act reducing the duty on imports and for other purposes," of July 30, 1846, the duty on "brandy and other spirits" is imposed, and to be computed, not upon the quantity which may have been purchased abroad, but upon the quantity which actually arrives in this country. *Ibid.*

228. Where, under the same act of July 30, 1846, duties were exacted and paid upon the leakage during the voyage to this country as *imported* liquors; *held:* that they were paid upon liquors not actually imported, and consequently that they were not imposed by law. *Ibid.*

229. In the collection of revenue on brandy and other spirits, the quantity actually imported is to be ascertained by the gauger's return, and not by the invoice. *Ibid.*

230. The measurement by gauge is, under the Acts of Congress, and according to the usage of the United States for more than half a century, the proper *legal* method for ascertaining the *quantity* of liquors imported. *Ibid.*

II. Duties on Deficiencies—Warehoused Goods—Mistake of Law and Fact—Voluntary Payments.

231. The petitioners, during the years 1847–1851, inclusive, imported large quantities of brandy and whiskey in casks. The quantity entered and appearing on the invoices, largely exceeded the quantity ascertained by the return of the gaugers, and under a regulation of the Treasury Department, then existing, duties were levied on the whole invoice quantity, without making any deduction for deficiencies shown by gauger's return. The several sums of money paid by the claimants for duties on such deficiencies, amounted to $2,068. They were paid *without* protest. Part of the duties so exacted were paid on the entries as estimated, or unascertained duties; but much the larger portion of such liquors imported by the claimants was warehoused, and the duties on the deficiencies thereon paid on the re-delivery of the liquors to them from the warehouses. *Held:* As to the duties exacted and paid on the entries as estimated or unascertained duties, the claimants are entitled to relief against the United States to recover the amount so paid. Per Scarburgh, J. *Sturges et al.* v. *The United States.* Second Opinion.

232. As to the duties paid without protest, on the deficiencies upon the liquors warehoused, when re-delivered to the claimants, *held:* the claimants are entitled to relief against the United States, to recover the amount so paid by them. *Ibid.*

233. *Held*, also: that money paid for duties not imposed by law, with a knowledge of all the facts, but under a mutual

mistake of the law—both parties having the law in contemplation, and in good faith meaning to conform to it, but acting under a misconstruction, which was ascertained by subsequent judicial construction, may be recovered back from the United States. *Ibid.*

234. *Held*, also: the money in this case, paid for duties not imposed by law, under an actual mistake of the law, was paid under a moral duress, and for that reason, also, cannot be regarded as voluntary. *Ibid.*

235. There is, *it seems*, a clear and practical distinction between *ignorance* and *mistake* of the law, founded in reason and justice, and sustained by eminent authority. *Ibid.*

236. Where money is paid under an actual mistake of the law, made directly with reference to the law itself, the payment, *it seems*, is not voluntary, or a gift to the party receiving it. *Ibid.*

237. Where money is paid with a knowledge of the facts, but in ignorance of the law, it is a gift, *it seems*, to the person who receives it. *Ibid.*

238. When the money is paid by one under a mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right, in good conscience, to retain, it may be recovered back, whether such mistake be one of fact or one of law. *Ibid.*

239. The maxim *ignorantia juris non excusat* may justly be invoked where crime has been committed, a wrong done, a right withheld, or a duty neglected. *Ibid.*

240. It is a perversion of both the language and the spirit of the maxim *ignorantia juris non excusat* to apply it to one

who has done no wrong, and withheld no right, and neglected no duty, but is himself the injured party, over whom an advantage in opposition to his legal rights and interests has been acquired. *Ibid.*

241. A payment cannot be a *gift* unless it be *voluntary*, and it cannot be voluntary unless it be made in the exercise of a *free will*. *Ibid.*

242. "If a man has actually paid what the law would not have compelled him to pay, but what in equity and good conscience he ought, he cannot recover it back." *Ibid.*

243. Where money is paid on a fair and deliberate compromise of a doubted and doubtful right, both parties standing on equal terms, and respectively taking their chances of the result, it cannot and ought not to be recovered back. *Ibid.*

III. Form, Object, and Effect of Protest—Payment of Duties under Mistake of Fact.

244. The denomination of articles in tariff laws, is to be construed according to the commercial understanding of the terms used; and whether the imported article is or is not known in commerce by the words or terms used in the tariff law, is a question of fact and not of law. Per Scarburgh, J. *Beatty's Executor v. The United States.**

245. Where an importer, in 1845, entered and paid duty on a quantity of saltpetre, under the mistaken supposition that as "partially refined saltpetre" it was *refined saltpetre*, and subject to duty, when in fact it was *crude saltpetre*, and under the tariff act of 1842 free from duty; (all saltpetre, in a com-

* A synopsis is given of this opinion also.

mercial sense, being included under two denominations, "refined saltpetre" and "crude saltpetre;") *Held:* it is a case where money to which the party receiving it was not entitled, was paid under a mistake of fact. *Ibid.*

246. In a case of payment of duties under a mistake of fact, prior to the act of March 3, 1839, there were to the importer two modes of proceeding: (1) by a suit against the collector, and (2) by petition to Congress. *Ibid.*

247. The former mode of proceeding might have been resorted to, if the importer, whilst the money was still in the hands of the collector, had given him notice of the mistake, and that he meant to hold him personally responsible for the money, or, to speak technically, had protested against its payment. *Ibid.*

248. But such notice or protest, although essential to the maintenance of the action against the collector, was in no way necessary to the support of the petition to Congress. Its object was merely to warn the collector not to pay over, and that the importer meant to hold him personally responsible for the money. *Ibid.*

249. There was, then, prior to the act of March 3, 1839, no prescribed form in which such notice or protest was to be given, nor was it necessary that it should be in writing. *Ibid.*

250. Both modes of proceeding were applications for justice; the only difference between them was, not in the right to redress, but that in the action against the collector the importer had an enforceable remedy, whereas, in his petition to Congress, he had not an enforceable remedy. *Ibid.*

251. The right to recover in an action against the collector, in a case, prior to the act of March 3, 1839, of payment

of duties under a mistake of fact, and subsequent protest before payment over by the collector to the government, was based upon a well-settled doctrine of the law of agency, that where money is illegally demanded and received by an agent, he cannot exonerate himself from personal responsibility by paying it over to his principal. *Ibid.*

252. That doctrine of the law of agency proceeded upon the assumption that the money sued for belonged to the party paying it, and not to the agent's principal. *Ibid.*

253. In a case of payment of duties under a mistake of fact, prior to the act of March 3, 1839, if the importer had not discovered the mistake, or having discovered it, had not made his protest, or given notice to the collector, before the latter had paid the money to the treasury, no action could have been maintained against the collector. *Ibid.*

254. But still, in such a case, the money which had been collected for duties not imposed by law, and which, therefore, did not belong to the United States, could not have become their property by the mere payment of it to the treasury. *Ibid.*

255. The position that such a payment would have produced such a result, cannot be sustained upon any principle of law, or of reason, or of justice, or of Christian morals. *Ibid.*

256. To retain money thus falling into the public treasury, would be as unconscientious in the United States as in an individual who had received money under similar circumstances, and the legal duty or liability to repay it the same with both. *Ibid.*

257. The act of March 3, 1839, did not take away, or in

any manner affect or impair, the right of petition to Congress for the repayment of duties not imposed by law. *Ibid.*

258. The act of March 3, 1839, does not favor the idea that, in order to constitute a legal demand against the United States, or support a petition to Congress for the repayment of duties not imposed by law, a protest was *essential* or necessary. *Ibid.*

259. The question of the "legality and validity" of the demand and payment of duties, prior to act of March 3, 1839, did not depend upon the protest, but altogether upon other grounds. *Ibid.*

260. The failure to make a protest, prior to the act of March 3, 1839, might have afforded *evidence* that the payment was *voluntary;* but, according to the principles of the common law which governed, the failure to protest could have had no other legal effect, or operation, upon the question of "the legality and validity" of the "demand and payment" of the duties. *Ibid.*

261. The failure to protest, prior to the act of March 3, 1839, would have had no effect whatever upon the question of the "legality and validity" of the demand and payment of the duties, in a case where the payment was made under a mistake of fact, because such a payment was never regarded as *voluntary*, in the technical sense of that term. *Ibid.*

262. The want of a protest, prior to the act of March 3, 1839, could be used on the hearing of the petition to Congress, or in the action against the collector, only as *evidence* that the payment was voluntary. *Ibid.*

263. Could the failure to make a protest or objection to the payment of duties, in any case, operate by way of an *estoppel in pais? Quere. Ibid.*

264. The act of February 26, 1845 (5 Stat. at Large, 727), in substance declares, that it was not the intention of Congress that the act of March 3, 1839, should have the effect to take away the right of action against the collector. *Ibid.*

265. There is nothing in the act of February 26, 1845, which either expressly, or by implication, shows an intention to do more than to require that the protest shall be "in writing, and signed by the claimant, at or before the payment of the duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." *Ibid.*

266. There is nothing in the act of February 26, 1845, which indicates an intention to give to the action against a collector a different legal effect from that which it had prior to the act of March 3, 1839. *Ibid.*

267. The failure to make a protest is no more conclusive against an importer now, than it was before the passage of the act of February 26, 1845. *Ibid.*

268. The act of February 26, 1845, contemplates two modes of reimbursing to an importer money paid for duties not imposed by law; (1) by the action of the Secretary of the Treasury, and (2) by a suit against the collector. *Ibid.*

269. There is another mode known to the law, and familiar in the practice of the government, of reimbursing to an importer money paid for duties not legally imposed; it is by petition to Congress, and is not embraced by the act of February 26, 1845. *Ibid.*

270. Where an importer, at the time of the passage of the act establishing this court, had a just claim against the United States for money paid them by mistake for duties not imposed by law, but no enforceable remedy for its recovery, and had,

by reason of the very mistake under which the payment was made, lost his remedy against the collector, and the Secretary of the Treasury had decided that his claim was "inadmissible under the laws," *Held:* his right to petition Congress still remained in unimpaired vigor, and his claim, as at its origin, still rested on an implied contract on the part of the United States to repay him the money. *Ibid.*

271. This money was his property, not theirs; and the United States were obliged, by the ties of natural justice and equity, to refund it; and being so obliged, the law, according to principles universally acknowledged, implied a promise on their part to pay it to him. *Ibid.*

272. His claim for the money, as a claim founded on an implied contract with the United States, comes within the very words of the act constituting this court, and is one of the cases for which it was designed to provide; and therefore the claimant's right to relief in this court is unquestionable. *Ibid.*

IV. Invoice Value or Price—Penal Duties—Duties Illegally Exacted.

273. The term "value" in Section 8 of the act of July 30, 1846 (9 Stat. at Large, 43), is used in the sense of *price.* Per Scarburgh, J. *Spence and Reid* v. *The United States.*

274. Although the proviso in Section 8 of said act of July 30, 1846, declares that under no circumstances shall the duty be assessed upon an amount less than the invoice *value*, yet a reduction of the invoice quantity is not a reduction of the invoice *value*, because it is not a reduction of the invoice *price.* *Ibid.*

275. If the price ascertained by the appraisers exceed ten

per centum, or more than the *price* declared on the entry, the penal duty may be exacted. *Ibid.*

276. The provision in the act of Congress, permitting goods which have been warehoused to be exported without the payment of duties thereon, does not extend to penal duties. *Ibid.*

277. A cargo of pimento was imported into Baltimore in October, 1849, and the invoice and entry truly represented its actual value at the time and place of shipment, but the weigher's return showed the net weight to be 2,776 pounds less than the quantity stated in the invoice, and the collector exacted duties on the quantity stated in the invoice; *held:* as to the 2,776 pounds, the difference between the gross quantity stated in the invoice, and the net quantity shown by the weigher's return, no duty could have been legally exacted thereon, as it was not imported. *Ibid.*

278. But the collector exacted duties upon such deficiency, and the importers paid them under protest, in order to obtain possession of the pimento actually imported; *held:* the money was paid under an illegal demand, made *colore officii*, and to enable the parties to exercise a legal right, and such payment was not *voluntary*. *Ibid.*

279. Wherever there is a duty there is a corresponding obligation to perform it. Duty creates the obligation to pay back money illegally exacted by the Government for duties, and from this obligation the law implies a promise on the part of the United States to repay it. *Ibid.*

V. Voluntary Payments—Failure to Protest.

280. When money is paid to the collector for estimated or unascertained duties by the importer, it is, *it seems*, not in the

nature of a pledge or deposit, but a *payment*, as it is made on account of a debt due by the importer to the United States at the time of its payment; and though not then ascertained, yet capable of ascertainment from elements then in existence. Per Scarburgh, J. *Wood* v. *The United States.*

281. When money is paid for estimated or unascertained duties, it is not, *it seems*, in its nature, a voluntary payment, *i. e.*, it is in no sense a *gift* to the United States. *Ibid.*

282. When money is paid for estimated or unascertained duties, it is not true in fact, or in law, *it seems*, that such a payment is voluntary, in the technical sense of that term. *Ibid.*

283. A contract to pay money upon an executed consideration (as the contract of the United States in the case of the payment of unascertained duties, to repay the excess to the importer), must be satisfied or released. The failure to make *protest* is, *it seems*, neither a satisfaction nor a release. *Ibid.*

284. A payment of unascertained duties, where no protest is made by the importer, is not, *it seems*, for *that reason*, voluntary; it is not so at its inception, and it does not become voluntary by reason of the failure to make a protest at or before the final adjustment of the duties made at the Custom House. *Ibid.*

285. The right to recover against the collector money paid for unascertained duties, to a greater amount than was imposed by law, was not, prior to the act of March 3, 1839, *it seems*, restricted to the excess ascertained by the adjustment made by the collector. *Ibid.*

286. A *gift* of what is due on a contract cannot be made to the person who owes it, otherwise than by a release under seal. *Ibid.*

287. If part of a debt be paid, and the creditor give a receipt expressing that the money is received in full of all demands, still, *it seems*, the obligation to pay the balance will remain wholly unaffected, unless there be some additional consideration to discharge it. *Ibid.*

288. Where money is paid to an agent for his principal, under such circumstances as would entitle the person making the payment to recover it back from the principal, if it had been paid directly to him, a suit may be maintained therefor against the agent, if, before he pays the money to his principal, notice is given to the agent that it will be reclaimed from him. Such notice (or *protest* as in the case of payment of unascertained duties) does not create the right to recover back the money; that results from other circumstances. The notice is necessary only because the agent is not liable in an action by the person who has mispaid the money, if he has paid it over to his principal without such notice. *Ibid.**

* From the judgment of the court in the case of *Wood* v. *The United States*, Judge Blackford dissented. In the opinion delivered by him, he says:

"The ground of my dissent is, that the duties in question were paid without objection. The dissenting opinions heretofore delivered by me in the cases of *Sturgess, Bennett & Co.* v. *The United States, Beatty's Executor* v. *The United States*, and *Spence and Reid* v. *The United States*, are referred to as a part of this opinion. In the examination of those cases, I became entirely satisfied that the act of Congress of 1845, cited and relied on by me, was a bar to the claims; and as I consider that act to be a bar in those cases, I, of course, consider it to be a bar in this case.

"Since the judgment of the majority of the court in the present case was rendered, I have met with a decision of the District Court of the United States for the Eastern District of Pennsylvania, which clearly shows that, even *before the act of* 1845, overcharged duties paid without objection could not be recovered back from the United States. Such payments made without objection are what the law denominates voluntary payments; and the law is well settled that money so paid cannot be recovered back. This principle not only applies to the present case, but is also applicable to the aforesaid cases of *Sturgess, Bennett & Co.* v. *The United States, Beatty's Executor* v. *The United States*, and *Spence and Reid* v. *The United States*."

289. In the years 1850, 1852 and 1853, the claimants imported into New York divers quantities of carbonate of ammonia. The collector exacted a duty of twenty per cent. thereon, which was paid by the claimants. By the tariff act of 1846 (9 Stat. at Large, 42, 48; Schedule G), a duty of ten per cent. *ad valorem* is imposed on ammonia and sal ammonia. It appeared, in evidence, that ammonia is a gas, as it is known in chemistry, and never in that shape an article of commerce. When combined with carbonic acid gas, it becomes a solid, called carbonate of ammonia, and is so known in commerce. *Held:* a duty of *ten* per cent. *ad valorem*, instead of *twenty* per cent. *ad valorem*, should have been levied on the carbonate of ammonia imported by the claimants, and they are entitled to judgment against the United States for the amount of duties, over ten per cent., exacted from and paid by them. Per Scarburgh, J. *Myer* v. *The United States.**

DECISIONS.

290. It seems the court will review the construction given to a statute by the accounting officers of the Treasury in the discharge of official duty, where they have *declined to act* under it, even in a matter specially referred by act of Con-

* Judge Blackford's dissenting opinion in *H. & F. W. Myer* v. *The United States.*

Suit for overpaid duties.

I dissent from the final judgment rendered in this case for the claimants.

The ground of my dissent is, that the duties sued for were paid without any objection whatever, either written or verbal. The payment was voluntary, and cannot be recovered back. See act of Congresss of 1845, 5 Stat. at Large, 727; *Marriott* v. *Brune*, 9 Howard, 619, 636; *Lawrence* v. *Caswell*, 13 Howard, 488, 496.

The dissenting opinions heretofore delivered by me in the cases of *Sturgess, Bennett & Co.* v. *The United States, Spence and Reid* v. *The United States, Beatty's Executor* v. *The United States*, and *Wood* v. *The United States*, are hereto appended, and made part of this opinion.

gress to be adjusted by them. Per Gilchrist, P. J. *Wigg* v. *The United States.*

291. Decisions in the public offices of the Government are facts, not rules of law. Per Same. *Accardi* v. *The United States.*

DEPARTMENTS.

292. The head of an executive department has not the legal authority, after a sum has been credited to a person in the employ of the Government as an officer of the United States, to re-open the account and charge him with the amount of such credit. Per Gilchrist, P. J. *Chase* v. *The United States.*

293. "If a credit has been given, or an allowance made, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals must be resorted to, to construe the law under which the allowance is made, and to settle the rights between the United States and the party to whom the credit was given." *Ibid.*

294. "The head of a department has not a right to review the decision of his predecessor allowing a credit, except to correct some error of calculation; if he is of opinion that the allowance was wrongful, he must have a suit brought." *Ibid.*

295. When Congress has conferred upon an individual, or a board, or a department, the power to examine and decide a matter, and the matter has been decided, is such decision final? *Quere.* Per same. *Wigg* v. *The United States.*

296. It is the duty of the departments to administer the law, and not to make it. They stand, in relation thereto, so far, upon the same ground with this Court, and with the judiciary in general. Per same. *Magruder* v. *The United States.* Second Opinion.

297. This Court may adopt rules of practice, and the departments make regulations, but they must be in strict subordination to law; wherever there is any antagonism between them, the "rules of practice" and "regulations" must yield, and the law of Congress govern. *Ibid.*

298. Decisions in the public offices of the Government are facts, not rules of law. Per same. *Accardi* v. *The United States.*

299. The act of August 23, 1842 (5 Stat. at Large, 510), does not apply *only* to the departments of the Government. The language of that act is general, and this court has no authority to limit its operation. Per Blackford, J. *Holman's adm'r* v. *The United States.*

300. No one but the head of a department, bureau or office at the seat of Government, can under any circumstances contract for the services of an extra clerk on account of the Government, in such department, bureau or office. Per same. *McElderry* v. *The United States.*

301. *It seems*, proof of voluntary services as extra clerk in a "department, bureau or office at the seat of Government," rendered with the knowledge of an agent of the Government, authorized by law to assent either expressly or impliedly to the performance of those services, will sustain a claim for compensation against the United States. *Ibid.*

302. *It seems*, the head of a department, bureau or office at the seat of government, can contract for the services of an extra clerk in such department, bureau or office, only during the session of Congress, or when the services of such extra clerk are indispensably necessary to enable such department, bureau or office, to answer some call made by either House of Congress at one session to be answered at another. *Ibid.*

303. The act of 1836, establishing the office of Auditor of the Treasury for the Post Office Department, gives no authority to any person to employ the messengers in said Auditor's office to perform extra services. Per same. *Cox* v. *The United States.*

304. The Secretary of the Treasury being the head of the department to which the office of Auditor of the Treasury for the Post Office Department is attached, and having the exclusive authority to appoint the clerks and messengers of that office, is the proper person to contract for extra services by messengers in said office. *Ibid.*

305. The claimant, while Chief Clerk in the State Department, at different periods between Aug. 10, 1833, and Nov. 9, 1836, was Acting Secretary of State, performing the duties of the office by authority of the President of the United States, on account of the absence or sickness of the Secretary of State. *Held:* the claimant, at the times he so performed the duties of Secretary of State, held an office separate from his office of Chief Clerk; that is, held two offices,—and as he discharged the duties of both is entitled to compensation accordingly. Per same. *Dickins* v. *The United States.*

306. Where the President of the United States, under the act of May 8, 1792 (1 St. at Large, 281), authorized any one to perform the duties, in case of absence or sickness, of Secretary of State, of Secretary of the Treasury, or of Secretary of War, the one so authorized is, *it seems*, entitled to receive for his services as acting Secretary of State, acting Secretary of the Treasury, or acting Secretary of War, the same compensation for the time he so acted which the law then allowed to the Secretaries of State, of the Treasury, and of War, respectively. *Ibid.*

EQUITY.

307. This court applies to cases before it the established principles of law and equity. Per Gilchrist, C. J. *Todd* v. *The United States.*

EVIDENCE.

308. By "legal evidence" is to be understood, ordinarily, evidence under oath. Per Same. *Noble* v. *The United States.*

309. The claimant offered in evidence, upon the hearing, an affidavit, dated in 1830. It was an *ex parte* affidavit, taken to be used, and actually used, before a Committee of Congress, and the deponent was dead. It accompanied the papers sent to the Court by the House of Representatives. *Held:* The affidavit comes within an exception to the ordinary rule that evidence is incompetent where the opposing party has had no opportunity to cross-examine the witness, and it may be used as evidence in this Court. *Ibid.**

310. To affidavits produced in evidence on the hearing, it

* The Court observed, in connection with this ruling, important to claimants: "*Ex parte* affidavits have always been used before the Committees, from necessity, for there was no person to whom to give notice, or, if any one had been notified, no one was bound to attend and cross-examine the witness. * * * * Cases are often pending before Congress for a whole generation. The tattered and discolored papers transmitted to us, and which, thirty years ago, were laid before Congress, are often the sole evidence of the facts on which the weary claimant relies. During the pendency of his claim his witnesses fade from manhood into old age; they die, and the memory of the facts perishes with them. It would be unjust in the extreme if we should hold that affidavits, under these circumstances, were incompetent to be used as evidence, and we shall therefore give to them that weight to which we think them entitled."

was objected, on the part of the Government, that the jurat was on the back, and the affidavits may have been written after the jurats. *Held:* in the absence of evidence of fraud, "there is no weight in the objection." *Ibid.*

311. To an affidavit, produced in evidence, it was objected, on behalf of the Government, that it was not signed by the witness; the objection was overruled. *Ibid.**

312. An affidavit offered in evidence, purported to have been sworn to before "Thom. Williamson, Alderman, Bo. of Norfolk." *Held:* "Although we (the Court) may not judicially know that an Alderman of Norfolk has the power to administer an oath," yet, "in the absence of any evidence to the contrary, that is *prima facie* sufficient." *Ibid.*

313. On the hearing, the solicitor, on behalf of the Government, introduced as evidence a paper, dated in 1830, and signed by one S. P., but not sworn to, which was among the papers sent to the Court by the House of Representatives; S. P., the signer, it appeared, was dead. *Held:* the paper is not competent evidence. *Ibid.*†

314. Where an Act of Congress requiring the Secretary of the Treasury to adjust and settle certain claims, does not prescribe the character of the proof, or upon what evidence

* The Court observed: "We know of no universal rule of law, that an affidavit, properly authenticated, should be signed. It is merely a further mode of proving that it is the affidavit of the person who purports to have made it. It is the jurat and not the signature that gives force, and causes it to be regarded as evidence."

† The Court remarked: "It possesses no quality which would render it admissible in any court of justice. Potter is dead; but to hold that a mere statement, unsupported by the solemnity of an oath, is competent to be read in evidence, would be to violate all the principles of evidence, and would be altogether unsafe."

he shall adjust and settle them, it is his duty to adopt the appropriate means, and to prescribe the necessary regulations. He may prescribe such rules and modes of legal proof as appear to him to be judicious. *Ibid.*

315. Where an Act of Congress provides that a sum of money shall be paid upon the production of certain proof, the Secretary of the Treasury cannot superadd, *it seems*, a requirement of further proof not required by the act. *Ibid.*

316. Executive officers, when an Act of Congress admits evidence of a certain kind, have no right, *it seems*, to decide that they will not render a decision in favor of a claimant, unless he produces evidence of a different kind. Per Same. *Magruder* v. *The United States.* Second Opinion.

317. The act of March 3, 1835, section 1, as to compensation of officers of the Navy temporarily performing the duties belonging to a higher grade, prescribes no particular mode of proof of service; consequently, under that act, any legal evidence is admissible. *Ibid.*

318. The regulation of the Treasury Department, which provides that the officer shall not be paid for performing the duties of a higher grade, unless he produces a *written* appointment to perform such duties, prescribes a condition not required by that act, which admits any legal evidence, while the regulation excludes it. *Ibid.*

319. The judgment of a Court of the United States, or of a State Court, where the same matter is in issue, is, *it seems*, in all other Courts conclusive, and binds parties and privies. Per Same. *Reeside's Executrix* v. *The United States.*

EXECUTIVE OFFICERS.

320. No part of the judicial power, under the Constitution of the United States, can be conferred upon an executive officer. Per Scarburgh, J. *Beatty's Executor* v. *The United States.*

321. If the act which a ministerial officer is required to do be *executive*, and not merely *ministerial* in its character, his decision is final as regards executive action, and no appeal lies from it to the courts, nor can they revise his judgment. *Ibid.*

FISHING BOUNTIES.

322. The seventh section of the act of July 29, 1819 (3 Stat. at Large, 52), which provides that, before the owner of a vessel shall receive the allowance (fishing bounty) mentioned in the act, he shall produce to the Collector a certificate, mentioning the days on which the vessel sailed and returned on her different voyages, does not, *it seems*, render necessary the production of a log book, although required by a regulation of the Treasury Department as a condition precedent to the payment of the bounties. Upon a certificate, as required by said 7th Section, the owner is entitled to the allowance. Per Gilchrist, P. J. *Noble* v. *The United States.*

323. Such certificate, *it seems*, where the master is unable to write, may be supplied by the production of reliable evidence of the times of sailing and returning, procured from other sources. *Ibid.*

324. The making of an agreement with each fisherman, pursuant to Sec. 8 of the act of July 29, 1819, is, *it seems*, the

only condition precedent to receiving the bounty allowed by the act of June 19, 1813. (3 Stat. at Large, 2.) *Ibid.*

325. An agreement which stated, the vessel is "to be employed on a fishing voyage or voyages, to commence on the ——, and to end on the ——, 18—," is a compliance, *it seems*, with the requirement of the act of June 19, 1813, (3 Stat. at Large, 2,) which enacts that the agreement shall express whether it "is to continue for one voyage or for the fishing season." *Ibid.*

326. An agreement, expressed to be "in consideration of one-half of the number of fish and oil, or proceeds of said voyage or voyages, after the shoreman's share is deducted, in proportion to the quantity or number of fish respectively caught and oil made," is a compliance so far, *it seems*, with the act of June, 1813, (3 Stat. at Large, 2,) which enacts that the agreement is to "express that the fish, or the proceeds of such fishing voyage or voyages which may appertain to the fishermen, shall be divided among them in proportion to the quantities or number of said fish which they may respectively have caught." The words "to be divided among us," or words of that import, in said agreement omitted, are *to be understood*, as such agreement expressly provides that one-half the proceeds of the voyage should belong to the fishermen, in proportion to the quantity of fish respectively by them caught, and in order to construe the agreement so that it shall have a meaning and every part have its effect. *Ibid.*

FOREIGNERS.

327. *It seems*, this court will entertain the petition of one *not a citizen*, and grant him relief upon a claim arising on contract with the United States. Per Gilchrist, P. J. *Porte* v. *The United States.*

GIFT.

328. A payment cannot be a *gift* unless it be *voluntary*, and it cannot be voluntary unless it be made in the exercise of a *free will.* Per Scarburgh, J. *Sturges et al.* v. *The United States.* Second opinion.

HALF-PAY.

329. A commissioned surgeon rendered medical services to the United States, and in their employ, as surgeon of a regiment of artificers, during the Revolution and up to March 29, 1781. *Held:* he was included in the class of "regimental surgeons" under the resolution of Congress of Sept. 30, 1780, which provided for "the pay and establishment of the officers of the Hospital department and medical staff." Per Gilchrist, P. J. *Baird* v. *The United States.*

330. The body of artificers attached to the army during the Revolution, in resolutions of Congress is called a regiment, and is declared to be a part of the regular army; the surgeon of it, therefore, was a "regimental surgeon." *Ibid.*

331. As regimental surgeon, he was an "officer" under the resolution of Congress of Jan. 17, 1781, which provided that the "officers reduced" should be entitled to "half-pay for life." *Ibid.*

332. Upon the reduction, March 29, 1781, of the body or regiment of artificers, its surgeon became entitled to half-pay, at the rate directed by the said resolution of Congress of Jan. 17, 1781, which provided that all officers in the Hospital department and medical staff, &c., who should continue in service to the end of the war, or be reduced before that

time as supernumeraries, should be entitled to receive during life, in lieu of half-pay, certain allowances—"regimental surgeons," an allowance equal to the half-pay of a Captain. *Ibid.*

333. To this half-pay or allowance for life as regimental surgeon, earned by meritorious services, and conferred upon him in consideration of the sacrifice of his time and his talents for the good of the cause which all had at heart, he became entitled, *it seems*, as a right founded upon a contract with Congress, which no subsequent legislation by Congress could, upon any principle of justice, or legal reasoning, take away from him. *Ibid.*

334. Said half-pay or allowance as regimental surgeon commenced March 29, 1781, the date of the reduction, and continued for life, that is, to the death of the officer, and was due at the end of every year, with interest at 6 per cent., under the resolution of Congress of June 3, 1784, to be paid from the time the half-pay became due. *Ibid.*

335. The party for whose estate this claim is made by petitioner as administrator, was surgeon of the regiment of artificers in the army of our Revolution from March 20, 1780, and served in that capacity until the regiment was reduced, March 29, 1781, and died October 27, 1805. *Held:* his half-pay was $240 per annum, payable at the end of every year. He was entitled to this from March 29, 1783, up to Oct. 27, 1805, the day of his death, and interest on the payments as they became due. There was, therefore, due him at the time of his death, $10,074 84; and this sum is due his estate, with interest thereon from that date, Oct. 27, 1805. *Ibid.*

336. An officer entitled to the benefit of the provision of

the resolution of Congress of Jan. 17, 1781, extending the grant of half-pay for life to the officers of the hospital department and medical staff, received under special act of June 23, 1836 (6 Stat. at Large, 641), five years full pay, as commutation for his half-pay for life under the resolution of Congress of March 22, 1783. *Held:* this was not a final settlement of his claim for half-pay; the payment of a sum of money not being of itself a discharge of a debt for a larger amount, and here there was no compromise. One party (the United States) to a contract cannot, without the assent of the other, discharge a debt by the payment of a smaller sum than the amount due. *Ibid.*

337. Claims for half-pay for life, by officers, under resolutions of Congress of Oct. 20, 1780; Jan. 17, 1781, &c., do not, *it seems*, come within any of the acts or resolutions, in the nature of acts of limitation, which required claims against the United States to be presented within a specified period, and are not barred by any of them. *Ibid.*

HEADS OF DEPARTMENTS.

338. No one but the head of a department, bureau or office, at the seat of Government, can under any circumstances contract for the services of an extra clerk on account of the Government, in such department, bureau or office. Per Blackford, J. *McElderry* v. *The United States.*

339. *It seems*, proof of voluntary services as extra clerk in a "department, bureau or office at the seat of Government," rendered with the knowledge of an agent of the Government, authorized by law to assent either expressly or impliedly to the performance of those services, will sustain a claim for compensation against the United States. *Ibid.*

340. Where such voluntary services as extra clerk are performed, but not "with the knowledge of an agent of the Government, authorized by law to assent either expressly or impliedly to the performance of those services," *Held:* there exists no claim for compensation against, or contract with, the United States. *Ibid.*

341. *It seems*, a contract for services as extra clerk in a department, bureau or office at the seat of Government, entered into by the head of such department, bureau or office, not in accordance with the provisions of the special appropriation act of August 26, 1842, Sec. 15 (5 Stat. at Large, 526), is in violation of such act, and void as against the United States. *Ibid.*

342. *It seems*, the head of a department, bureau or office at the seat of Government, can contract for the services of an extra clerk in such department, bureau or office, only during the session of Congress, or when the services of such extra clerk are indispensably necessary to enable such department, bureau or office to answer some call made by either house of Congress at one session to be answered at another. *Ibid.*

343. The head of an executive department has not the legal authority, after a sum has been credited to a person in the employ of the Government as an officer of the United States, to re-open the account, and charge him with the amount of such credit. Per Gilchrist, P. J. *Chase* v. *The United States.*

344. "If a credit has been given, or an allowance made, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals must be resorted to, to construe the law under which the allowance is made, and to settle the rights between the United States and the party to whom the credit was given." *Ibid.*

345. "The head of a department has not a right to review the decision of his predecessor allowing a credit, except to correct some error of calculation; if he is of opinion that the allowance was wrongful, he must have suit brought." *Ibid.*

346. "It is no longer a case between the correctness of an officer's judgment and that of his successor. A third party is interested, and he cannot be deprived of a payment or a credit so given, but by the intervention of a court to pass upon his right." *Ibid.*

IGNORANCE.

347. The maxim *ignorantia juris non excusat* may justly be invoked where crime has been committed, a wrong done, a right withheld, or a duty neglected. Per Scarburgh, J. *Sturges et al.* v. *The United States.* Second Opinion.

348. It is a perversion of both the language and the spirit of the maxim *ignorantia juris non excusat*, to apply it to one who has done no wrong, and withheld no right, and neglected no duty, but is himself the injured party, over whom an advantage in opposition to his legal rights and interests has been acquired. *Ibid.*

INDIANS.

349. The intention of the treaty of August 9, 1814 (7 Stat. at Large, 120), with the Creek Indians, is not to give to the *reservee* an estate in fee simple in the land, but merely a right of occupancy. Per Gilchrist, P. J. *Lindsay* v. *The United States.*

350. Under said treaty of August 9, 1814, the *contingent* interest of the United States in reservations of land to any

chief or warrior of the Creek nation, does not depend merely upon the construction of the words "voluntary abandonment." *Ibid.*

351. *It seems*, the act of March 3, 1817 (3 Stat. at Large, 380), was intended as declaratory of the *meaning* of said treaty of August 9, 1814, with the Creeks. *Ibid.*

352. Where chiefs of the Creek tribe obtained, under the treaty of August 9, 1814, a cession of lands, which they subsequently occupied, and afterwards, during their lives, for a valuable consideration, sold, without fraud and in good faith on the part of their grantees, assigning as a title their certificate of reservation, and such lands passed to the claimant by subsequent intermediate conveyances in fee, also for a valuable consideration, without fraud and in good faith. *Held*: the claimant has no *legal* cause of action against the United States, and they are not bound to convey to him their interest in the lands. *Ibid.*

353. The effect of the sale in such case by the *reservees*, was to give to the United States a legal right to the land, which they had not before the sale. *Ibid.*

INTEREST.

354. Interest is not a legal incident to a debt due from the United States, where it is merely proved that a debt is due. Per Gilchrist, P. J. *White* v. *The United States.*

355. The right to interest is wholly conventional in its origin, as it depends upon law and usage; where they are not found the right cannot be said to exist. Per Same. *Todd* v. *The United States.*

356. The liability of the United States to pay interest can-

not be founded on such a usage as enters into and forms a part of the contracts of individuals; the usage is directly and expressly the reverse. *Ibid.*

357. The Government has not only omitted to pay interest, but for the greater part of a century it has expressly refused to pay it. *Ibid.*

358. The liability of the United States to pay interest upon a debt cannot be traced to any of the sources from which the liability of individuals to do so can be deduced. *Ibid.*

359. There are no acts, nor is there any general law of Congress, which imposes upon the United States the liability to pay interest upon debts due by them, nor has any *general* appropriation of money ever been made by Congress for the purpose of paying claims for interest. *Ibid.*

360. There are no adjudged cases which might serve as precedents to this court for deciding that the United States are legally bound to pay interest, as, until the institution of the court, there was no mode in which a suit would lie against the United States, or by which their liability to pay interest could be made the subject, except incidentally, of judicial investigation. *Ibid.*

361. It is not within the province or the duty of this court to say how far it would be just and equitable for the United States to pay interest, by analogy to the laws and usages which regulate pecuniary dealings between individuals. *Ibid.*

362. Are the United States bound to pay interest under the name of "damage," or "injuries," or "indemnity," or "satisfaction," or "redress," or corresponding words, in treaty stipulations? *Quere.* *Ibid.*

363. As to interest, this court will confine itself to determine how far the United States are bound by law to pay interest upon a sum ascertained to be due. *Ibid.*

364. An approximation to a rule at common law, as to interest, is to be found in those decisions which hold that, in the absence of a contract to pay interest, it may, in some cases, be allowed by the jury, upon a view of all the circumstances in the case; for this purpose the Court of Claims does not occupy the position of a jury. *Ibid.*

365. This court cannot allow interest upon claims against the United States in the absence of a contract to pay it, even "in cases of long delay under vexatious and oppressive circumstances," as this would render necessary the exercise of a "vague and unlimited discretion" not vested in the court. *Ibid.*

366. The allowance of interest by the court as *an incident to the debt*, at common law, is always founded upon the agreement of the parties. *Ibid.*

367. *It seems*, as long ago as the year 1819, *a refusal* to allow interest was the usual practice of the Treasury Department, and this practice has existed to the present time, except when dispensed with by some special law. *Ibid.*

368. *It seems*, under the third section of the act of June 5, 1848 (9 Stat. at Large, 236), allowing interest on all sums advanced by States, corporations or individuals, in organizing, subsisting and transporting volunteers, in all cases where the State, corporation or individual "paid or lost the interest, or is liable to pay it," proof that money was expended for the purposes stated in the act entitles the claimant to interest upon the amount so expended by him. Per Gilchrist, P. J. *Beaugrand* v. *The United States.*

369. The resolution of Congress of June 3, 1784, that "an interest of six per cent. per annum should be allowed to all creditors of the United States for supplies furnished or services done from the time that the payment became due," was a voluntary contract on the part of the United States, constituting a legal claim against them, from which no subsequent legislation could release them without the assent of the other party. Per same. *Baird* v. *The United States.*

370. The claimant, G., and another, L., in 1817, were contractors on the Cumberland road. During the progress of the work, the Superintendent determined to alter the plan for making the road, and directed the contractors, L. and G., to conform to his new plan, thereby increasing the expenses of the work performed by them, assuring them that the United States would compensate them therefor. L. and G. constructed their part of the road agreeably to such directions of the Superintendent. The special act for their relief, of 1848 (9 Stat. at Large, 711), authorized the Secretary of the Treasury "to settle upon principles of equity the accounts of" L. and G., &c. The balance allowed and paid them under said act was $3,931 71. The petitioner claims from the United States interest on that sum from the time when the work was done, in 1817, to the present; *Held:* The court has no jurisdiction in the case, and the claimant is not legally entitled to recover. Per Blackford, J. *Gay* v. *The United States.*

371. *Held:* also, the circumstance that by the special act of 1848 the Secretary was to settle the account upon the principles of equity, did not necessarily require that interest should be allowed upon the sum found due L. and G. *Ibid.*

JUDGMENT.

372. The "opinion in the case," which, by Section 7, of the act creating it, this court "shall report to Congress," can

mean only an opinion in the nature of a judgment as to the rights of the parties upon the facts proved or admitted in the case. Per Gilchrist, P. J. *Todd* v. *The United States.*

373. The final decision of the Board of Commissioners, under our treaty of 22d February, 1819, with Spain, disallowing a claim, must be taken to be correct—the judgment of a judicial tribunal of exclusive jurisdiction, without appeal; and a complete bar to any reconsideration of such claim by the court. Per Blackford, J. *Thomas* v. *The United States.**

374. The Board of Commissioners under the convention of 1831, with France, had exclusive jurisdiction, under the act of Congress, of the cases referred, and there is no law giving an appeal from its judgment to any other tribunal. Per same. *Roberts* v. *The United States.*

375. The decision of the Commissioners to carry into effect the treaty of 1831, with France, against a claim, like the judgment of a court of competent jurisdiction, is a bar to a petition in this court for the same demand. *Ibid.*

376. When Congress has conferred upon an individual, or a board, or a department, the power to examine and decide a matter, and the matter has been decided, is such decision final? *Quere.* Per Gilchrist, P. J. *Wigg* v. *The United States.*

377. In 1839 there were accounts to a large amount unsettled between the claimant's testator, James Reeside, and the United States. In that year the United States commenced a suit against him, in the Circuit Court of the United States for the Eastern District of Pennsylvania. After a lengthy and elaborate trial, on Dec. 6, 1841, the jury found a verdict

* The Board mentioned had authority "to receive, examine, and decide upon the amount and validity" of the claims referred to it.

against the Government. From a transcript of the record it appeared: the jury "find for the defendant, and certify that the plaintiffs are indebted to the defendant in the sum of $188,496 06." On May 12, 1842, a motion for a new trial was refused, and judgment was rendered on the verdict. On Aug. 1, 1842, the plaintiffs sued out a writ of error, which was subsequently dismissed by the Supreme Court. The claimant insists that the verdict so rendered should conclude all further controversy as to the facts which were litigated, and should be deemed here record and indisputable evidence that the United States owed J. R. the sum of $188,496 06 at the date of the verdict; and claims to recover that amount from the United States, with interest thereon from the date when verdict was rendered. *Held:* That this is a "debt of record," and the United States owe the claimant the sum of $188,496 06 with interest at 6 *per cent.* from Dec. 6, 1841, the date of said verdict. Per Gilchrist, P. J. *Reeside's Executrix* v. *The United States.*

378. *Held*, also: that it is substantially, to all intents and purposes, a judgment by a court of competent jurisdiction, and the defendant therein is entitled to recover theron of the United States the sum certified by the jury to be due, after a full hearing of the merits of the matters in controversy between the parties. *Ibid.*

379. *Held*, also: the balance found due from the United States, by the verdict, has the effect of a debt of record under the act of May 26, 1790 (1 Stat. at Large, 122). *Ibid.*

380. *Held*, also: there is no difference between the effect of a judgment between private persons, of this character, and a similar judgment in a case where the United States are plaintiffs, except that in the latter, the judgment cannot be enforced by execution against the United States. It is still a

judgment upon the matters in issue, and its payment left not to the execution of process, but to the faith of the United States. *Ibid.*

381. *Held*, also: as to the claim of interest upon the amount of the verdict, the Judiciary Act of Sept. 24, 1789, which provides that the laws of the several States shall be regarded as "rules of decision," &c., refers such claim for interest to be determined, in this case, by the law of Pennsylvania. *Ibid.*

382. When the United States voluntarily submit themselves to the jurisdiction of a court, which is governed in its adjudications by the laws of a particular State, and those laws provide that a balance found by a verdict of a jury against the plaintiff shall be "a debt of record," *held:* this court will consider a judgment upon such a verdict as a debt of record which the United States are bound to pay. *Ibid.*

383. Individuals, when sued by the United States, may avail themselves of credits or set-offs against the United States. *Ibid.*

384. The United States, to a certain extent, consented that they may be sued, by the act of March 3, 1797 (1 Stat. at Large, 514), allowing a defendant in an action by them to file a set-off. *Ibid.**

*The opinion of the Court, in the case of *Reeside's Executrix* v. *The United States*, contains this passage:

"An argument has been addressed to us by one of the counsel for the claimant, for the purpose of showing that under the Constitution a citizen may sue the United States without their consent. But there are numerous dicta showing the opinion of the Supreme Court to the contrary. It perhaps would be promotive of justice if the United States could be sued. Mr. Chief Justice Jay, in the case of *Chisholm* v. *Georgia*, 2 Dallas, 478, says: 'I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could

385. There is nothing in the act of March 3, 1797 (1 Stat. at Large, 514), which prohibits the defendant, in an action against him by the United States, from having allowed to

in the peaceable course of law be compelled to do justice, and be sued by individual citizens.' Mr. Justice Story, while lamenting the absence of any provisions to enable the creditors of the United States to sue, takes it for granted that such provisions would be constitutional, and refers to the English proceeding of a petition of right. Story's Comm., § 1672. But the general liability of the United States to be sued, is not a question before us. It is enough to say, that when the United States voluntarily submit themselves to the jurisdiction of a court, which is governed in its adjudications by the laws of a particular State, and those laws provide that a balance found by a verdict of a jury against the plaintiff shall be 'a debt of record,' we can conceive of no process of logical reasoning which could induce us to consider a judgment, upon such a verdict, as anything but a 'debt of record' which the United States are bound to pay."

Judge Blackford delivered a dissenting opinion, which, among other topics, alludes to this question, whether the United States are or are not liable to be sued, and as follows:

"A great effort was made by one of the claimant's counsel, to show that the United States might be sued in the Circuit Court; and that, therefore, the jury had authority to return said certificate. But that effort entirely failed. The Supreme Court of the United States, in said case relative to a mandamus, use the following language: 'It is well settled, too, that no action of any kind can be sustained against the government itself, for any supposed debt, unless by its own consent, under some special statute allowing it, which is not pretended to exist here. *Briscoe* v. *Kentucky Bank*, 11 Peters, 321; 4 Howard, 288; 9 Howard, 389.

"'The sovereignty of the government not only protects it against suits directly, but against judgments even for costs, when it fails in prosecutions. 4 Howard, 288.

"'Such being the settled principle in our system of jurisprudence, it would be derogatory to the court to allow the principle to be evaded or circumvented.

"'They could not, therefore, permit the claim to be enforced circuitously, by mandamus, against the Secretary of the Treasury, when it could not be directly against the United States; and when no judgment on and for it had been obtained against the United States.

"'As little also would be the propriety of allowing by *scire facias*, or otherwise, a judgment to be entered against the United States on a set off, when

him in such action, by way of off-set, a larger sum than the United States are seeking to recover. *Ibid.*

386. Section 34 of the act of Sept. 24, 1789, commonly called the Judiciary Act (1 Stat. at Large, 92), has nothing to do with the proceedings after judgment. It means only that the judgment shall be rendered according to the laws of the State. It refers solely to the judgment and the nature of the judgment, and its effect must be determined by the laws of the State where rendered. *Ibid.*

387. The *scire facias* is "only a judicial writ, is no new suit, but a mere handmaid in the original cause, and a step towards execution." *Ibid.*

388. The judgment of a court of the United States, or of a State court, where the same matter is in issue, is, *it seems*, in all other courts conclusive, and binds parties and privies. *Ibid.*

it could not have been allowed in an action against them on the subject-matter of the set-off.

"'To permit a demand in set-off against the government to be proceeded on to judgment against it, would be equivalent to the permission of a suit to be prosecuted against it. And however this may be tolerated between individuals by a species of reconvention, when demands in set-off are sought to be recovered, it could not be as against the government except by a mere evasion, and must be as useless in the end as it would be derogatory to judicial fairness. A set-off or reconvention is often to be treated as a new suit by the defendant, and the pleadings and judgment are to be made to correspond. (See Louisiana Code of Practice, 374, Secs. 371, 377.) *Reeside* v. *Walker*, 11 Howard, 290.'

"That is a decision in point by the Supreme Court of the United States, that in a suit brought by the United States, and a set off pleaded, there can be no judgment for any amount whatever against the United States. And the above opinion of the Supreme Court was delivered in reference to the very proceedings which are now relied on by the claimant. I consider that decision to be, of itself, a perfect answer to the present claim."

JUDICIAL PRECEDENTS.

389. A judicial tribunal or court, in presenting its views of the case decided, may with propriety draw its arguments from any source of which in its discretion it may approve. Per Scarburgh, J. *Wood* v. *The United States.*

390. But no motive of public policy can justify or excuse a court where, as in the United States, the executive, legislative and judiciary departments of Government are kept separate and distinct, in attempting, by a decision in one case, to lay down rules to be followed in any other case, not of the same character as the one decided. *Ibid.*

391. In making a decision in one case, no court can rightfully undertake to do more than merely decide *that case.* Its decisions, by virtue of the principle which gives value to a judicial precedent, may be followed, and, when it is the court of the last resort, in most instances ought to be followed in other cases. *Ibid.*

392. A judicial decision is followed, not because the court so orders, but by reason of the merits of the decision as a judicial precedent. It is upon this ground that the decisions of the highest courts become authoritative, and are regarded as evidences of great principles. *Ibid.*

JUDICIAL SALES.

393. A sale of the United States, acting through their officers, in an enemy's country, of personal property in their possession, to which they claim a title by the rights of war, is not a judicial sale or made by authority of a court. For the purposes of such a sale, the officers making it are not to

be regarded as a court of law or officers of a court. Per Gilchrist, P. J. *Porte* v. *The United States.*

394. In a sale made on behalf of the United States, under Section 1 of the act of May 7, 1800 (being a judicial sale), there was no implied warranty of title; neither the marshal nor auctioneer, while acting within the scope of their authority, could be considered as warranting the property sold, nor could the marshal do any act that would expressly or impliedly bind the United States by warranty. Per Same. *Puckett* v. *The United States.*

395. The United States Marshal for Mississippi, under Section 1 of the act of May 7, 1800 (2 Stat. at Large, 61), sold certain real estate on behalf of the United States, and the claimant, a partner in the purchase, on such sale, paid as consideration the sum of $5,000, which passed into the Treasury, but, subsequently to such payment, ascertained that the lands, sold as the property of one Harris, through whom the United States derived title, in fact belonged to other persons, and that Harris never had any title to them, and consequently no title passed by virtue of such sale by the United States; and said sale was made without notice of any defect in the title. *Held:* the claimant is not legally entitled to recover back from the United States the $5,000, so paid by him. *Ibid.*

396. An assurance given by the marshal, on such sale, "that he would make title at a future day," cannot be the foundation of a right in the claimant to recover back the consideration paid by him. Where the marshal steps out of his official duty, his declarations cannot bind the United States. *Ibid.*

397. The marshal, upon a sale under Section 1 of the act of May 7, 1800, was "the mere minister of the law to execute

the order of the Court," and a due discharge of his duty required no more than that he should give to purchasers a fair opportunity of examining and informing themselves of the nature and condition of the property offered for sale. *Ibid.*

398. The marshal, upon a sale under Section 1 of the act of May 7, 1800, could do no more than convey to the purchaser such right and interest in the land as the United States possessed, and the payment thereon by the purchaser is to be considered as having been made in consideration of the conveyance to him of the right and interest of the United States in the premises, such as they may have been, and not in consideration that they would convey a good title to the land. *Ibid.*

399. In a sale, under Section 1 of the act of May 7, 1800, the grantee bought only what the United States had the right to sell; and where, without fraud, they sold only their interest, the consideration cannot be said to have failed with the title, so as to give a right of action against them to their grantees. *Ibid.*

400. In every sale of personal property, except a judicial sale, there is implied warranty of title or of peaceable possession. Per Same. *Porte* v. *The United States.*

JUDICIARY.

401. No part of the judicial power, under the Constitution of the United States, can be conferred upon an executive officer. Per Scarburgh, J. *Beatty's Executor* v. *The United States.*

402. Every ministerial officer is obliged to make a *decision*, in the first instance, in every case in which he is called upon

to act; but it is not conclusive upon the rights of the party interested, in the sense in which a judicial decision would be: he would still be entitled to appeal to Congress. *Ibid.*

403. If the act which a ministerial officer is required to do be *executive*, and not merely *ministerial* in its character, his decision is final as regards executive action, and no appeal lies from it to the courts, nor can they revise his judgment. *Ibid.*

404. The authority to adjust claims for injuries, under Art. 9 of the Treaty of 1819 with Spain, was not, by the acts of March 3, 1823, and June 26, 1834, given to the Courts in Florida, but to the Judges respectively. It is not judicial power, properly speaking, but that of a *Commissioner* only, that was conferred. Per Blackford, J. *Humphrey's Administratrix* v. *The United States.*

405. The Judges of either of the Superior Courts in Florida, in the adjustment of claims for injuries under Art. 9 of the Treaty of 1819 with Spain, acted merely as a *Commissioner* and not as a Court, and the power to review his decisions, given by Act of Congress to the Secretary of the Treasury, was, therefore, unobjectionable. *Ibid.*

406. When the terms of a treaty stipulation import a contract—when either of the parties thereby engages to perform a particular act, the treaty addresses itself to the political, not to the judicial department, and the Legislature must execute the contract before it can become a rule for the court. *Ibid.*

JURISDICTION.

407. This court has no authority to determine that a party has a *legal* claim against the United States, unless the claim

presented comes within one of the three classes of cases specified in the act creating the court; or if referred to the court by either house of Congress, is "*founded on some legal right.*" Per Gilchrist, P. J. *Lindsay* v. *The United States.*

408. This court is authorized to examine any case referred to it by either House of Congress, to report its opinion upon the law, and to state the facts as it finds them to be proved; but in relation to the matters which address themselves particularly to the sound discretion and liberality of Congress, the court does not feel itself authorized to recommend any legislation, but, *it seems*, will submit to Congress a bill for the relief of the petitioner, for such action as may be deemed proper. *Ibid.*

409. By the institution of the Court of Claims a new party defendant has been called into existence, and made to appear before it. Per Same. *Todd* v. *The United States.*

410. When a petition is presented to this court the United States occupy the position of an ordinary defendant in a suit at law. *Ibid.*

411. If a claim be alleged to be "founded upon any law of Congress," this court will construe such law and ascertain its meaning by applying to it those rules of construction which a wise and long-continued experience has determined to be the best adapted to that purpose. *Ibid.*

412. If a claim be alleged to be founded "upon any regulation of an Executive department," this court will construe such regulation and ascertain its meaning by the same rules of construction. *Ibid.*

413. If a contract with the government be the foundation of a claim, this court will determine the nature and validity

of such contract by the application thereto of known and well-settled principles of law. *Ibid.*

414. The application of principles of law in this court is equally necessary in regard to the claims referred to it by "either House of Congress" as in those of which the court has jurisdiction apart from such reference. *Ibid.*

415. The duties of this court are not advisory or its decisions recommendatory, but its qualities are only those which properly belong to a court, which can only adjudge whether its jurisdiction be final or not. *Ibid.*

416. In establishing the Court of Claims, Congress did not intend to constitute a council, to advise them what course it would be honest and right or expedient for them to pursue in any given case. *Ibid.*

417. In establishing this court, Congress intended "to establish a court for the investigation of claims," to ascertain the facts in each case, and the legal rights and liabilities arising from those facts. *Ibid.*

418. This court does not occupy the position of a jury, but necessarily, to a certain extent, exercises some of the functions of one. It is called upon to determine questions of fact. *Ibid.*

419. This court possesses no portion of that wide discretion which, according to some of the cases at common law, juries may often exercise. *Ibid.*

420. It is not the duty of this court to recommend to Congress the passage of laws to supply any such deficiencies as may be supposed to exist. *Ibid.*

421. *It seems*, where by act of Congress it is specially referred to the accounting officers of the Treasury, among other things, to adjust and settle certain claims, which they decline to do, upon review and reversal of such decision, the court proceeds itself to adjust and settle the claims. Per Gilchrist, P. J. *Wigg* v. *The United States.*

JURY.

422. An approximation to a rule at common law, as to interest, is to be found in those decisions which hold that, in the absence of a contract to pay interest, it may, in some cases, be allowed by the jury, upon a view of all the circumstances in the case; for this purpose the Court of Claims does not occupy the position of a jury. Per Same. *Todd* v. *The United States.*

423. This court does not occupy the position of a jury, but necessarily, to a certain extent, exercises some of the functions of one. It is called upon to determine questions of fact. *Ibid.*

424. This court possesses no portion of that wide discretion which, according to some of the cases at common law, juries may often exercise. *Ibid.*

LAW OF NATIONS.

425. In all that the commanding officer does in an enemy's country, so far as he is justified by the law of nations, he represents the country by whose authority he is there in command of a military force. Per Gilchrist, P. J. *Porte* v. *The United States.*

426. In a state of war, where the ordinary tribunals are

silent, a nation incurs the risk of pecuniary liability for the acts of its officers in the enemy's country, who must act with promptness and decision, without the experience or legal skill which at home and in a time of peace are applied to the ascertainment of legal rights; their course of conduct must be determined by what seems best under existing circumstances. *Ibid.*

427. The principles regulating the rights of nations at war, when an army is in possession of an enemy's country, are clearly established by writers on the law of nations. *Ibid.*

428. Our army, while in actual possession in Mexico, by the law of nations had a right to seize the property of the Mexican government as lawful prize. *Ibid.*

429. During such occupation, our officer or officers commanding at Puebla, or elsewhere, had there, for the time being, supreme civil and military authority, and in their existing capacity represented the United States, whose officers and servants they were. *Ibid.*

430. *It seems*, where there exists a military occupation, as that of Mexico by our forces, the laws of the conquered country are silent in the presence of the victorious army. *Ibid.*

431. Mexico, in our war with her, so far as she was occupied by a competent military force, was for the time a conquered country, and all ordinary civil jurisdiction and remedies were merged in the rights of conquest. *Ibid.*

432. In a state of war we have, as a nation, the right to deprive our enemy of his possessions, of everything which may augment his strength and enable him to make war. *Ibid.*

433. All movable property taken from the enemy in war

comes under the denomination of booty, which naturally belongs to the sovereign making war, and is vested in him from the moment it comes into his power. *Ibid.*

434. In a state resulting from a state of war, if property be seized under an erroneous supposition that it belongs to the enemy, it may be liberated by the proper authorities, but no action can be maintained against the party who has taken it, in a court of law. *Ibid.*

435. Property captured in war belongs, in the first instance, to the nation: whatever right the captors acquire is derived by grant. The mere taking possession of the property does not of itself vest the title to it in the captors. Per Gilchrist, P. J. *Decatur* v. *The United States.*

436. As the title to the proceeds or value of a vessel as prize of war depends on a grant, it must conform to the conditions of the grant, which are that the vessel, after having been captured, shall be brought into port, and condemned as lawful prize. *Ibid.*

437. As weakness does not deprive a nation of her rights, it does not release her from the obligations which she owes to other nations. Per same. *Owners of the Brig Armstrong* v. *The United States.*

438. "Since men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature, nations, composed of men, and considered as so many free persons, living together in the state of nature, are naturally equal, and inherit from nature the same obligations and rights." *Ibid.*

439. Power or weakness does not in this respect produce any difference. A small republic is no less a sovereign State than the most powerful kingdom. *Ibid.*

440. By the law of nations all independent powers stand upon an equality as regards their rights and duties, whether they be relatively weak or relatively powerful. *Ibid.*

441. In a state of war, any violation of the neutrality of a neutral port by a belligerent, is a breach of the law of nations. *Ibid.*

442. The property of belligerents, when within a neutral jurisdiction, is inviolable. *Ibid.*

443. It is not lawful to make neutral territory the scene of hostility, or to attack an enemy while within it; and if the enemy be attacked, or any capture made under neutral protection, the neutral is bound to redress the injury and effect restitution. *Ibid.*

444. If the party, belonging to a belligerent power, attacked in a neutral port, merely exercises the right of self-defence, that cannot be a cause of complaint as violating the rights of the neutral. *Ibid.*

445. "No measure is to be taken," by a belligerent in a neutral port, "that will lead to immediate violence." *Ibid.*

446. The neutral, *it seems*, is obliged to give pecuniary indemnification for damages and material losses that may have been caused in her ports by one belligerent to another, even where it can be shown that she used all the means at her disposal to give protection. *Ibid.*

447. Even where the neutral uses for the purpose all the means in her power, but is unable to resist the attack in her ports by one belligerent upon another, the law of nations, *it seems*, does not relieve her from the obligation to make pecuniary compensation. *Ibid.*

448. As it is the duty of the neutral to use her utmost endeavors to give protection to belligerents within her ports, it follows that she must do it at her own expense, even by going to war if other means are not sufficient. *Ibid.*

449. The reason which requires a neutral to restore a vessel captured in her waters, calls on her also to make compensation where a vessel is destroyed there. The same principle lies at the foundation of either duty. *Ibid.*

450. *It seems*, the nation that assumes to be neutral in a war, as she claims the rights, is subject to the obligations of neutrality. She stands so far in relation to other nations upon a common ground with them, whatever may be their relative power. *Ibid.*

451. "A neutral nation preserves towards belligerent powers the several relations which nature has instituted between nations. She ought to show herself ready to render them every office of humanity reciprocally due from one nation to another. She ought, in everything not directly relating to war, to give them all the assistance in her power, and of which they may stand in need." *Ibid.*

452. The neutral is not a host extending hospitality *ex mera gratia* to a belligerent who comes into his port, but is part of the great republic of nations, bound to render offices of humanity. *Ibid.*

LIABILITY OF UNITED STATES.

453. The United States are not *ordinarily* responsible for either the malfeasance or non-feasance in office of a public officer. Per Scarburgh, J. *Thistle* v. *The United States.*

454. When the United States, by their authorized officer, become a party to negotiable paper, they have all the rights, and incur all the responsibility of individuals who are parties to such instruments. There is no difference, except that the United States cannot be sued. Per Same. *Beers* v. *The United States.*

455. The United States are liable, *it seems*, to damages on a protested bill of exchange drawn by them, in the same manner, and to the same extent, as an individual. *Ibid.*

456. When the United States voluntarily submit themselves to the jurisdiction of a court, which is governed in its adjudications by the laws of a particular State, and those laws provide that a balance found by a verdict of a jury against the plaintiff shall be "a debt of record," *held:* this court will consider a judgment upon such a verdict as a debt of record, which the United States are bound to pay. Per Gilchrist, P. J. *Reeside's Executrix* v. *The United States.*

457. Section 34 of the act of Sept. 24, 1789, commonly called the Judiciary Act (1 Stat. at Large, 92), has nothing to do with the proceedings after judgment. It means only that the judgment shall be rendered according to the laws of the State. It refers solely to the judgment and the nature of the judgment, and its effect must be determined by the laws of the State where rendered. *Ibid.*

458. Individuals, when sued by the United States, may avail themselves of credits or set-offs against the United States. *Ibid.*

459. The United States, to a certain extent, consented that they may be sued, by the act of March 3, 1797 (1 Stat. at Large, 514), allowing a defendant in an action by them, to file a set-off. *Ibid.*

460. There is nothing in the act of March 3, 1797 (1 Stat. at Large, 514), which prohibits the defendant, in an action against him by the United States, from having allowed to him in such action, by way of off-set, a larger sum than the United States are seeking to recover. *Ibid.*

461. Wherever there is a duty there is a corresponding obligation to perform it. Duty creates the obligation to pay back money illegally exacted by the Government for duties, and from this obligation the law implies a promise on the part of the United States to repay it. Per Scarburgh, J. *Spence et al.* v. *The United States.*

462. In all that the commanding officer does in an enemy's country, so far as he is justified by the law of nations, he represents the country by whose authority he is there in command of a military force. Per Gilchrist, P. J. *Porte* v. *The United States.*

463. In a state of war, where the ordinary tribunals are silent, a nation incurs the risk of pecuniary liability for the acts of its officers in the enemy's country, who must act with promptness and decision, without the experience or legal skill which at home and in a time of peace are applied to the ascertainment of legal rights; their course of conduct must be determined by what seems best under existing circumstances. *Ibid.*

464. It is the nation that carries on the war, and not the individual officer, and it follows that the nation is liable for the acts of such agents as it sees fit to employ in the prosecution of its object. *Ibid.*

465. Our country is bound to protect our rights as individuals; and if this protection be not afforded us, she is bound to render us such an equivalent as it is in her power to be-

stow. Per Gilchrist, P. J. *Owners of the Brig Armstrong* v. *The United States.*

466. When the United States make a treaty which, by their construction of it, precludes the claimant from being heard, and refuse their sanction and authority to him to appear and present his case before the arbitrator under that treaty, and the award is adverse to the claimant, under these circumstances the United States are bound in damages. *Ibid.*

467. When our government submits the claim of a citizen upon a foreign power to arbitration, if he is not permitted a hearing, or to be represented before the arbitrator and heard in defence of his rights, and the award is adverse to him, the United States become responsible to the claimant for the damages he sustains. *Ibid.*

468. The award, in such case, having been made against the United States, *they* are answerable to the claimant for the loss he has sustained, upon the principle that a nation, being entitled to the allegiance and obedience of its citizens, is solemnly bound, in return, to protect not only their persons but their property. *Ibid.*

469. The ordinary principles of law and morality, which are applied to regulate the dealings of individuals, are applicable to transactions between the United States and their citizens. Per Same. *White* v. *The United States.*

LIMITATION.

470. *It seems* the United States cannot plead the statute of limitation in this court without the express authority to do so of Congress, or be subject to other laws enacted before they (the United States) could be made a party to suits, and

whose application to them as such could not have been anticipated. Per Gilchrist, P. J. *Todd* v. *The United States.*

471. Claims for half-pay for life, by officers, under resolutions of Congress of Oct. 20, 1780, Jan. 17, 1781, &c., do not, *it seems*, come within any of the acts or resolutions, in the nature of acts of limitation which required claims against the United States to be presented within a specified period, and are not barred by any of them. Per Same. *Baird* v. *The United States.*

MAIL CONTRACTS.

472. Where the claimant, for the period from 1st November, 1848, to June 30, 1850, carried the mail under a contract with the Government, by which the sum of $6,894 per year was paid for transporting it from Houston to Sabinetown, semi-weekly, in two-horse coaches, but the service was in fact performed by him in four-horse coaches, and it was necessary, owing to the condition of the roads and water-courses, that four-horse coaches should be used for that purpose, and the Post Office Department knew that the mail was so carried by the claimant in four instead of two-horse coaches, and made no objection; *Held:* the claimant is entitled to compensation from the United States for the extra service, over and above the sum allowed by his contract. Per Same. *Huston* v. *The United States.*

473. The 23d section of the act of July 2, 1836 (5 Stat. at Large, 85), does not, either in its letter or its spirit, provide that no claim for extra allowances should be valid against the United States unless *an order* for additional service was made by the Postmaster-General. *Ibid.*

474. As the Postmaster-General, under Sec. 23 of the act of July 2, 1836, might make temporary express contracts,

the United States might then be bound by the obligation of an implied contract for carrying the mail, proved in such a way as is recognized by the rules of law to be binding upon individuals. *Ibid.*

475. The claimants being contractors to carry the mail on the route between Wheeling and Cincinnati, in 1845, it became desirable to expedite the line so as to reach Cincinnati at an earlier hour in the day, to connect with the morning boats to Louisville. To that end, on Nov. 1 of that year, it was proposed to the claimants by the Postmaster-General, to run through to Xenia in time to connect with the first train of cars which left at about 6 or 7 A. M., and that the better to enable this to be done, he would allow them $1,200 a year for the extra service. The proposition of the department was accepted by the claimants on Nov. 10. On Nov. 13, they accordingly started the second line of coaches from Zanesville, and ran it during the contract—two years seven and a half months. Of this extra service by a second line the department took notice, and imposed fines for not delivering in schedule time the mails by that line. After Nov. 13, and in the course of that month, the railroad from Xenia changed its morning departure to 8½ A.M., so that it was rendered impossible, and so continued, to make the arrivals in Cincinnati until after the departure of the morning boat to Louisville. The contractors claim for the extra service so performed by them, at $1,200 per annum, for the 2 years 7½ months. *Held:* the proposition of the department of Nov. 1, was substantially an offer to give the claimants, then contractors, $1,200 per annum for running the second line, if they would thereby expedite the mails so as to reach Cincinnati in sufficient season for the morning boat. It was a conditional and not an independent offer, and as the condition was not complied with, the claimants have no cause of action. Per Gilchrist, P. J. *Neil et al.* v. *The United States.*

476. The resolution of Congress of May 24, 1828 (4 Stat. at Large, 322), authorized the Postmaster-General to cause to be examined the route from Mobile to Pascagoula; and if in his opinion it should be the most expedient route to New Orleans, he was authorized to adopt it, in lieu of the then present one from Mobile to New Orleans. On June 17, 1828, the Postmaster-General gave notice that proposals would be received at the department, for carrying the mail three times a week between Mobile and New Orleans, in steamboats. At this time there was no road from Mobile to Pascagoula, and the mail was necessarily transported for the whole distance by water. On Aug. 16, 1828, the claimant R. wrote to the department, saying, that the route from Mobile to New Orleans by the way of Pascagoula bay, was much the shortest and most certain way to carry the mail, and also that "it must be conveyed thirty or forty miles by land in stages, the residue of the way by steamboats," and offering to carry the mail, agreeably to the proposals, thrice a week for $14,000 per year, and added: "The road from here (Mobile) to Pascagoula to be made by, or at the expense of the United States. The road I will be obligated to make within sixty days from the time I may receive the notice, for the sum of $4,000, or for $100 per mile. The money to be paid on the completion of the work." The letter closed by saying: "In case of our getting the contract, I should like to have the earliest information, or in case I should have the opening of the road." On Oct. 7, 1828, the claimants were duly informed in writing that the Postmaster-General had decided to accept their proposal to transport the mail by land and water, between Mobile and New Orleans, at the rate of $14,000 *per annum*. According to the claimants' offer, the road was commenced by them, and completed by Dec. 15, and on Dec. 17 they wrote the department that they should commence running the mail, and accordingly commenced running it on that day. They received no answer till they received the letter of the department of Feb. 29, 1829, when they were informed that

the department possessed no means to remunerate them, and that the department intended so to inform them on Dec. 29 preceding, which would have been after the expiration of the time within which they had offered to make the road. *Held:* the proposal of the claimants was, in substance, to transport the mail by land and water, for $14,000 a year, provided the United States would pay the expense of making the road over the land route, as there was no road in existence. Per Gilchrist, P. J. *Rhodes* v. *The United States.*

477. *Held*, also: or the transaction may be regarded in substance, as an offer by the claimants to transport the mail for $18,000 per year, for the first year, and to build the road, it being well known to the department that there was no road from Mobile to Pascagoula, and that without such a road the mail between Mobile and New Orleans, could not be transported by land and water. *Ibid.*

478. Also, *held:* the acceptance by the department of the proposal was an acceptance of the proposal with the conditions upon which that acceptance was offered, as they were not excluded by the terms of the acceptance. *Ibid.*

479. Also, *held:* to adopt a route for the transportation of the mail where there is no road, means under the resolution of May 24, 1828, to take the steps necessary to enable the mail to be transported over that route. *Ibid.*

480. Under the resolution of Congress of May 24, 1828, (4 Stat. at Large, 322,) the Postmaster-General had the power to contract with the claimants, to transport the mail over said new route between Mobile and Pascagoula, and to agree to pay them for such duty $18,000 for the first year, and $14,000 for the remaining years of the existence of the contract. *Ibid.*

481. Also, *held:* the Postmaster-General might decline to pay the expense of making the road, upon the ground that he had no funds which could be appropriated for that purpose, but it by no means follows that the claimants have not a legal cause of action against the United States; as the resolution of May 24, 1828, authorized the making of the road, its effect was to give validity to the claim of the person who should make it. Second Opinion. *Ibid.*

482. Also, *held:* the Government, in this case, received the benefit of the labor of the claimants in making the road, and should, upon principles of law and justice, make compensation for it to the claimants. *Ibid.*

483. As the Postmaster-General may lawfully pay a larger sum for the transportation of the mail over a difficult and expensive route, than for transporting it over an easy and cheap route, *à fortiori*, he may pay a larger sum for such transportation where, in addition to conveying the mail, the contractor is compelled to make a road over which to transport it. *Ibid.*

484. If one contracts with the department to transport the mail from one given point to another, between which points it is known to the department that no road exists, and to fulfil his contract he must prepare, and in fact makes a road, the contractor may be compensated by the department for such duty and expense by a sum sufficient to pay him for carrying the mail under such circumstances. *Ibid.*

MISTAKE.

485. *It seems*, the doctrine that, between man and man, an action lies to recover back money paid under a mistake of fact, and that it is unconscientious in such a case to retain it, obtains equally as regards the Government. Per Scarburgh, P. J. *Beatty's Executor* v. *The United States.*

486. Where a party once had full knowledge of a fact, which he had forgotten at the time of making a payment of money, his forgetfulness of it was such a mistake of fact as entitles him to recover back the money. *Ibid.*

487. In the case of payment of money made under a mistake of fact, it may often happen that the possession of the means of knowledge would afford strong evidence of actual knowledge, but there is no conclusive rule of law that because a party has the means of knowledge he has the knowledge itself. *Ibid.*

488. There is, *it seems*, a clear and practical distinction between *ignorance* and *mistake* of the law, founded in reason and justice, and sustained by eminent authority. Per Scarburgh, J. *Sturges et al.* v. *The United States.* Second Opinion.

489. Where money is paid under an actual mistake of the law, made directly with reference to the law itself, the payment, *it seems*, is not voluntary, or a gift to the party receiving it. *Ibid.*

490. Where money is paid with a knowledge of the facts, but in ignorance of the law, it is a gift, *it seems*, to the person who receives it. *Ibid.*

491. When the money is paid by one under a mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right, in good conscience, to retain, it may be recovered back, whether such mistake be one of fact or one of law. *Ibid.*

NAVY.

492. By the plain and obvious meaning, and the words, of Sec. 1 of the act of March 3, 1835 (4 Stat. at Large, 756),

if an officer of the Navy temporarily performs the duties belonging to a higher grade, he is entitled to increased compensation. Per Gilchrist, P. J. *Magruder* v. *The United States.* Second Opinion.

493. If an officer of the Navy *actually* performs the duty belonging to a higher grade, he is entitled *prima facie* to the benefit of Section 1 of the act of March 3, 1835: but if any evidence exists which shows that, although the officer actually did the duty, he performed it under such circumstances as would render it unreasonable and contrary to the true meaning of said act that he should receive additional compensation, then it should not be paid. *Ibid.*

494. The act of March 3, 1835, Section 1, as to compensation of officers of the Navy temporarily performing the duties belonging to a higher grade, prescribes no particular mode of proof of service; consequently, under that act, any legal evidence is admissible. *Ibid.*

495. The claimant M. was senior lieutenant on board the frigate Columbia, from April 18, 1838, to June 28, 1840, during which time Commodore Read commanded the United States naval forces in the East Indies, of which the Columbia formed a part, and M. stood towards Commodore Read in the relation of Captain of the Columbia, and actually performed the duties of captain during said period. He claims the difference between the pay of a lieutenant and that of a captain, for the period during which he so performed the duties of a captain. The claim was duly presented for payment. Part of it, viz.: for the time during which the commodore was obliged to be absent from the ship on shore, was allowed by the treasury department, and paid under a certificate of the commodore, dated Dec. 7, 1841, and the act of March 3, 1835, but the claim was refused for the remainder of the time, during which he certified that the claimant "performed the

duties of captain." The reason given by the department for such refusal was, that the Navy department had offered to order a captain to the Columbia previous to her sailing, which offer was not accepted. There was a regulation of the treasury department, *it seems*, at the time in force, requiring as evidence in support of claims to extraordinary pay for having performed the duties of a superior grade, a written acting appointment from the Secretary of the Navy, or if such service should be called for while the vessel was at sea, then such written appointment from the commodore, &c. *Held:* the claimant is entitled to judgment for the difference between the pay of a lieutenant and that of a captain on sea service, from April 18, 1838, to June 28, 1840, deducting so much of said difference as he may have received at the treasury. Per Gilchrist, P. J. *Magruder* v. *The United States.*

496. Also, *held:* as the claim is founded upon the performance by the claimant of the duties of a captain during a period prior to the passage of the act of Aug. 26, 1842 (5 Stat. at Large, 536), his right to the compensation he seeks must depend on the act of March 3, 1835 (4 Stat. at Large, 756), which was in force during that period. *Ibid.*

497. Also, *held:* by the act of March 3, 1835, any officer performing the duties of a higher grade is entitled to the pay of that higher grade, without any reference to his having been ordered to perform such duties by his superior. *Ibid.*

498. Also, *held:* the difference between the acts of March 3, 1835, and Aug. 26, 1842, is simply, that by the act of 1835, the mere performance of the duties entitled the officer to the increased pay, while by the act of 1842, in order to be thus entitled, he must have been ordered to perform the duties by one of the superior officers mentioned. *Ibid.*

499. Also, *held:* the act of Aug. 26, 1842, was intended

to limit the act of March 3, 1835, requiring for the future a special order to entitle the officer to the increased pay, and it did not deprive him of any right which had become vested in him by the act of 1835. *Ibid.*

500. Also, *held:* the fact that Commodore R. declined the offer of a captain before he left the United States, did not operate as a waiver, or deprive the claimant of the right he would otherwise have under the act of Congress. *Ibid.*

501. Also, *held:* the regulations of the department, requiring as evidence a *written* appointment to perform the duties, prescribed a condition not required by the act of March 3, 1835, which admits any legal evidence. *Ibid.*

502. The petitioner, a major in the army, claims from the United States $150, paid for medical services. The engineer department was entitled to the services of a surgeon. None could be procured. The commodore permitted Dr. W., an assistant-surgeon in the navy (to whom the $150 were paid), to attend. He was not ordered to it. It was no part of his duty. The claimant, as senior officer, employed him and made the contract with him, which was approved by the engineer department. The charge was disallowed at the treasury, on the ground that Dr. W., as an assistant-surgeon in the navy, was prohibited, under Section 2 of the act of March 3, 1835, (4 Stat. at Large, 757,) and also by Section 3 of the act of March 3, 1839, (5 Stat. at Large, 349,) from receiving the allowance; *Held:* that the true construction of the act of March 3, 1835, did not prohibit Dr. W. from receiving compensation for his services not within the line of his duty, from third persons; that the petitioner lawfully paid him the sum claimed, and has a right to have the said sum ($150) credited to him, the petitioner, by the United States. Per Gilchrist, P. J. *Chase* v. *The United States.*

503. In such case Dr. W., although an assistant-surgeon in the navy, was *pro hac vice* simply a citizen. He neglected no duty, and violated no principle, in performing the service in question. *Ibid.*

504. The object of Section 2 of the act of March 3, 1835, to regulate the pay of the Navy, was to consolidate the various allowances (as for drawing bills, for receiving and disbursing money, and for transacting business for the Government generally), which officers of the Navy had before that time received, into one annual sum. *Ibid.*

NAVY COMMISSIONERS.

505. *It seems*, the Navy Commissioners, constituted by the act of February 7, 1815, acting under the superintendence of the Secretary of the Navy, had authority by the act of March 3, 1839, (5 Stat. at Large, 339,) to make a contract for "blank-books, contracts and bonds," at specified prices, for the use of the office of the Board, as it was part of the ministerial duties of their office, and was a matter "connected with the naval establishment of the United States." Per same. *Gideon* v. *The United States.*

506. The act of August 31, 1842, (5 Stat. at Large, 579,) repealing the act constituting the Board of Navy Commissioners, and providing for the establishment of five bureaux, did not require any more or different duties to be performed by those bureaux than had heretofore been entrusted to the Commissioners. For the purpose of facilitating the business of the department, the act of August 31, 1842, merely provided for a division of labor. *Ibid.*

507. *It seems*, contracts made under the authority of the Navy Commissioners, unfulfilled at the time of the passage of

the act of August 31, 1842, were not abrogated by the operation of that act, but remained in force under it. *Ibid.*

508. Where a contract, entered into by the Board of Navy Commissioners, valid at the time it was made, remained unfulfilled at the passage of the act of August 31, 1842; *Held:* the United States could not put an end to such contract, either by an act of Congress or through the agency of the Navy Department, without being responsible to the other contracting party for the damages he sustained thereby. *Ibid.*

NEUTRALITY.

509. In a state of war, any violation of the neutrality of a neutral port by a belligerent, is a breach of the law of nations. Per same. *Owners of the Brig Armstrong* v. *The United States.*

510. The property of belligerents, when within a neutral jurisdiction, is inviolable. *Ibid.*

511. It is not lawful to make neutral territory the scene of hostility, or to attack an enemy while within it; and if the enemy be attacked, or any capture made under neutral protection, the neutral is bound to redress the injury and effect restitution. *Ibid.*

512. If the party, belonging to a belligerent power, attacked in a neutral port, merely exercises the right of self-defence, that cannot be a cause of complaint as violating the rights of the neutral. *Ibid.*

513. Firing the first shot in such a case, in self-defence, is, *it seems*, not an aggression, but justified by reason and law. *Ibid.*

514. The act of sending out boats, by a belligerent in a

neutral port, to effect a capture, is in itself an act directly hostile, a violation of neutrality and within the prohibition of the law of nations. *Ibid.*

515. "No measure is to be taken," by a belligerent in a neutral port, "that will lead to immediate violence." *Ibid.*

516. The neutral, *it seems*, is obliged to give pecuniary indemnification for damages and material losses that may have been caused in her ports by one belligerent to another, even where it can be shown that she used all the means at her disposal to give protection. *Ibid.*

517. Even where the neutral uses for the purpose all the means in her power, but is unable to resist the attack in her ports by one belligerent upon another, the law of nations, *it seems*, does not relieve her from the obligation to make pecuniary compensation. *Ibid.*

518. As it is the duty of the neutral to use her utmost endeavors to give protection to belligerents within her ports, it follows that she must do it at her own expense, even by going to war if other means are not sufficient. *Ibid.*

519. The reason which requires a neutral to restore a vessel captured in her waters, calls on her also to make compensation where a vessel is destroyed there. The same principle lies at the foundation of either duty. *Ibid.*

520. *It seems*, the nation that assumes to be neutral in a war, as she claims the rights, is subject to the obligations of neutrality. She stands so far in relation to other nations upon a common ground with them, whatever may be their relative power. *Ibid.*

521. "A neutral nation preserves towards belligerent

powers the several relations which nature has instituted between nations. She ought to show herself ready to render them every office of humanity reciprocally due from one nation to another. She ought, in everything not directly relating to war, to give them all the assistance in her power, and of which they may stand in need." *Ibid.*

522. The neutral is not a host extending hospitality *ex mera gratia* to a belligerent who comes into his port, but is part of the great republic of nations, bound to render offices of humanity. *Ibid.*

OFFICIAL SERVICES.

523. Where the petitioners, an assistant-messenger and a laborer employed in the General Post-office Department during the whole term, from January 1, 1839, to January 1, 1843, by order of that department, rendered extra services beyond the particular duties of their respective stations; *Held:* so much of their claim for such extra services as is for services rendered after the acts of March 3, 1839, of August 23, 1842, and of August 26, 1842, were passed, cannot be allowed, as such an allowance is by said acts, expressly forbidden; *aliter* as to so much of their claim as is based on services rendered between January 1 and March 3, 1839, upon which the claimants are entitled to relief. Per Scarburgh, J. *White and Sherwood* v. *The United States.*

524. The public printer of the House of Representatives, elected under Sec. 8 of the act of Aug. 3, 1846 (9 Stat. at Large, 113), is an "officer," and also an "employé" in the Legislative department of the Government, within the meaning of the joint resolution of July 20, 1854, and as such entitled to the "increased compensation of twenty per cent."

provided by that resolution. Per Gilchrist, P. J. *Nicholson* v. *The United States.*

525. For some time immediately preceding Jan. 13, 1845, the claimant was a clerk in the General Land Office, at $1,200 salary. On that day he received a letter from the Commissioner stating: "One hundred dollars have been added to your salary, to take effect from this date." In 1836 an act was passed (5 Stat. at Large, 111, 112, Sec. 10), in force at the date of said letter, authorizing said Commissioner to employ sixteen clerks, at salaries of $1,300 each. It appeared from the pay-rolls, made up Dec. 1, 1844, and Jan. 1, 1845, that on each of those dates there were in the General Land Office, sixteen clerks with $1,300 salary, exclusive of the claimant. He never demanded his salary at the rate of $1,300 after Jan. 13, 1845, but on the contrary, at the expiration of each month while he continued in office, for more than eight years, signed a receipt at $100 per month in full payment of his salary. He now claims arrears of salary (at $1,300 a year, amounting to $845 03). *Held:* the receipts given by the claimant show that he continued while so in office to be a clerk at the annual salary of $1,200; and as there were in office, when said notice was given by the Commissioner, sixteen clerks, with $1,300 salaries, exclusive of the claimant, this court must presume that he received all he was entitled to. Per Blackford, J. *Wagaman* v. *The United States.*

PARTIES.

526. By the institution of the Court of Claims, a new party defendant has been called into existence, and made to appear before it. Per Gilchrist, P. J. *Todd* v. *The United States.*

527. When a petition is presented to this Court, the United States occupy the position of an ordinary defendant in a suit at law. *Ibid.*

528. The court cannot decide a case where they have not before them the various parties who have an interest in the question, and have no power to make them parties to the proceeding. Per Same. *Hale* v. *The United States.*

PATENT OFFICE.

529. Where, as alleged, T., the petitioner, the inventor of certain improvements in dragoon and pack-saddles, in January, 1847, filed with the Patent Office the requisite petition, &c., as required by law, for a patent for said improvements, and such application was, before May, 1847, reported, and took its place on the files of the office, to be acted upon in its turn; and in November, 1837, before such application was reached in its turn, G., as inventor, filed in the Patent Office an application, &c., for a patent also for improvements in a dragroon and pack-saddle, which covered the same grounds, and embraced the same claims set forth in T.'s application; and the Commissioner did not give T. notice of the conflicting claim and application of G., as required by law. In December, 1847, before T.'s claim had been reached and acted on, an official note was sent to the Commissioner by the then Secretary of State, urging that as the early issue of a patent for his invention to G. would facilitate a supply for the Government of dragoon saddles, it might be issued to him, G., as soon as practicable. Therefore G.'s application was taken up before its turn, and a patent granted to him thereon, Dec. 11, 1847, within thirty days after filing his petition, and the application of T. still remains in the Patent Office, not acted upon and postponed. And T. claims, by reason of the premises, damages from the United States. *Held:* that the wrong done to T., if any, was not committed by the United States, or by any officer of theirs, under such circumstances as render them pecuniarily responsible to T. therefor. Per Scarburgh, J. *Thistle* v. *The United States.*

PAY.

530. The object of Section 2 of the act of March 3, 1835, to regulate the pay of the Navy, was to consolidate the various allowances, (as for drawing bills, for receiving and disbursing money, and for transacting business for the Government generally), which officers of the Navy had before that time received, into one annual sum. Per Gilchrist, P. J. *Chase* v. *The United States.*

PAYMENT.

531. A payment cannot be a *gift* unless it be *voluntary*, and it cannot be voluntary unless it be made in the exercise of a *free will.* Per Scarburgh, J. *Sturges et al.* v. *The United States.* Second Opinion.

532. "If a man has actually paid what the law would not have compelled him to pay, but what in equity and good conscience he ought, he cannot recover it back." *Ibid.*

533. Where money is paid on a fair and deliberate compromise of a doubted and doubtful right, both parties standing on equal terms, and respectively taking their chances of the result, it cannot and ought not to be recovered back.
Ibid.

PENALTIES AND FORFEITURES.

534. The petitioner, while an agent, appointed by the Secretary of the Navy, for the preservation of timber on the public lands of Florida, in the discharge of his duty, in 1843, informed of, seized and captured quantities of live oak timber which had been cut and removed from public lands in Florida by trespassers. The timber had been hewn and fashioned into keelson and beam pieces for ship-building before its

seizure. It was libeled, condemned and appropriated by the United States to their own use. The petitioner claims that, under Section 3 of the act of March 2, 1831 (4 Stat. at Large, 472), he is entitled, as informer, to one-half the value of the timber so seized, condemned and appropriated. *Held:* the improved value of the timber was not a penalty or forfeiture "incurred under the provisions of this act," and the petitioner, therefore, is not entitled to the relief claimed. Per Scarburgh, J. *Thistle* v. *The United States.* (Case No. 2.)

535. The timber in question, in its improved condition, was as much the property of the United States as it was before the trespassers took it into their possession. The latter lost their labor, but the improved value of the timber was not forfeited. A forfeiture implies that there was some right to be forfeited, but no right whatever was acquired in the timber by the wrong-doer, in whose possession it was found by the claimant. *Ibid.*

PENSION AGENTS.

536. In September, 1838, the claimant was duly appointed Army and Navy pension agent of the United States, for the City of New York, and continued to hold that office till January 29, 1842. At the time of his appointment, and for the next succeeding five years, no provision existed by law for the compensation, or payment of the expenses, of pension agents. He accepted the appointment, in the full belief that his compensation and expenses would be provided for by the Government. He continued the correspondence with the departments, begun by his predecessor, and expressly and repeatedly declined to continue in the discharge of the duties of the office unless the promised provision was made, but was induced to go on by the assurance, from time to time, of the departments, that his compensation and expenses would be provided for. The petitioner claims $5,000 for five years'

services, at $1,000 *per annum*, and the further sum of $1,200, for rent and clerk's hire during the same period, together with interest thereon. *Held:* this court has no jurisdiction to grant relief to the petitioner. Per Scarburgh, J. *Knapp* v. *The United States.*

537. By its terms the act of February 20, 1847 (9 Stat. at Large, 127), as to compensation of pension agents, is prospective only in its operation. *Ibid.*

538. *It seems*, from April 20, 1836, to February 20, 1847, there was an act of Congress in full force (the act of April 20, 1836—5 Stat. at Large, 16), which declared that no compensation or allowance should be made to "persons or corporations" for making payment of pensions, without authority of law. *Ibid.*

539. "Without authority of law," means without authority of an act of Congress. *Ibid.*

540. It was not competent for the Secretary of War, during the period between April 20, 1836, and February 20, 1847, to make a contract binding on the United States for the compensation of any person whom he might appoint to pay pensions. *Ibid.*

541. The clear meaning of the act of April 20, 1836 (5 Stat. at Large, 16), was that no compensation or allowance should be made to a pension agent until Congress should by law provide for it. *Ibid.*

542. Those who acted as pension agents, between April 20, 1836, and February 20, 1847, must be regarded as having acted with the full knowledge that the law forbade the making of any compensation to them, and that the United States were under no *legal* obligation to compensate them. *Ibid.*

543. It was the obvious intention of the act of April 20, 1836 (5 Stat. at Large, 16), to protect the United States from any legal obligation to compensate pension agents. *Ibid.*

PENSIONS.

544. The petitioner entered the naval service in 1830, and served for a period of eighteen years, at various times and in different vessels. He performed the duties of a first-class musician. Serving on the United States ship Independence, he fell down one of the hatchways while taking his hammock below, receiving thereby an injury which resulted in the amputation of his leg. He claims a pension for the disability; *Held:* the disability happened to him "in the line of his duty," and he is entitled therefor to a pension under Section 8 of the act of April 23, 1800. (2 Stat. at Large, 53.) Per Gilchrist, P. J. *Accardi* v. *The United States.*

545. The pension laws are beneficial in their nature, and are, therefore, to be construed beneficially in matters of inevitable doubt. *Ibid.*

546. The fact that, at the time of such accident by falling down the hatchway, he had a lameness in one of his knees, of long standing, which did not, however, interfere with the duties of his vocation as a musician, does not deprive the claimant of the pension to which the disability from the amputation of his leg might entitle him. *Ibid.*

PLEADING.

547. The petition, in a case before the court, is defective, which does not specify what person or persons are owners of the claim, or interested therein. Per Scarburgh, J. *White & Sherwood* v. *The United States.*

548. The allegation in a petition that services, for which a claim is made, were rendered by order of the General Post-office Department, is equivalent to an allegation that such services were rendered by order of the Postmaster-General, and is so understood by the court. *Ibid.*

549. It is not necessary, *it seems*, to set forth in the petition points which are merely matters of proof. Per Gilchrist, P. J. *Noble* v. *The United States.*

550. Where the claim is founded upon an act or acts of Congress, such act or acts, *it seems*, should be stated in the petition. *Ibid.*

POST-OFFICE DEPARTMENT.

551. The object of Section 23 of the act of July 2, 1836, (5 Stat. at Large, 85,) was, among other things, to impose a check upon the exercise of the discretionary power of the Postmaster-General, by requiring that everything relative to his action upon the subject of *extra allowances* should be recorded where it might be inspected, so that when the public money should be expended, nothing relating to its expenditure should be left unexplained or uncertain. Per Gilchrist, P J. *Huston* v. *The United States.*

552. Where the Postmaster-General, in June, 1828, gave notice that proposals would be received for carrying the mail over a particular route, an acceptance of the proposal, upon a reasonable construction, is an acceptance of the proposal with the condition upon which such acceptance is offered, unless they are excluded by the terms of the acceptance. Per Same. *Rhodes* v. *The United States.*

553. The 23d Section of the act of July 2, 1836, (5 Stat. at Large, 85,) does not, either in its letter or its spirit, provide

that no claim for extra allowance should be valid against the United States unless *an order* for additional service was made by the Postmaster-General. Per Same. *Huston* v. *The United States.*

554. As the Postmaster-General, under Section 23 of the act of July 2, 1836, might make temporary express contracts, the United States might then be bound by the obligation of an implied contract for carrying the mail, proved in such a way as is recognized by the rules of law to be binding upon individuals. *Ibid.*

555. The act of 1836, establishing the office of Auditor of the Treasury for the Post-office Department, gives no authority to any person to employ the messengers in said Auditor's office to perform extra services. Per Blackford, J. *Cox* v. *The United States.*

556. The Secretary of the Treasury being the head of the department to which the office of Auditor of the Treasury for the Post-office Department is attached, and having the exclusive authority to appoint the clerks and messengers of that office, is the proper person to contract for extra services by messengers in said office. *Ibid.*

557. The fact that extra work was done by authority of the Auditor of the Treasury for the Post-office Department, who officially acts under and for the Secretary of the Treasury, is not evidence that the Secretary employed or authorized such extra service. *Ibid.*

PRACTICE.

558. This court applies to cases before it, the established principles of law and equity. Per Gilchrist, P. J. *Todd* v. *The United States.*

559. This court cannot adjudge, without founding its judgments upon the law which is its rule of conduct, and where it can find no law it can render no judgment. *Ibid.*

560. The obvious duty of this court is to expound the law as they find it established, and apply it to the cases before them, and not to create it; *jus dicere*, and not *jus dare*. *Ibid.*

561. The "opinion in the case," which, by Section 7 of the act creating it, this court "shall report to Congress," can mean only an opinion in the nature of a judgment as to the rights of the parties upon the facts proved or admitted in the case. *Ibid.*

562. This court is authorized to examine any case referred to it by either House of Congress, to report its opinion upon the law, and to state the facts as it finds them to be proved; but in relation to the matters which address themselves particularly to the sound discretion and liberality of Congress, the court does not feel itself authorized to *recommend* any legislation, but, *it seems*, will submit to Congress a bill for the relief of the petitioner, for such action as may be deemed proper. Per Same. *Lindsay* v. *The United States.*

563. *It seems*, this court has no power to make others, *not represented*, parties to proceedings before it. Per Same. *Hale* v. *The United States.*

564. *It seems*, a decision either in favor of, or against a claimant, upon a partial (not general) view of the case, will not be made by this court. *Ibid.*

565. The court cannot decide a case where they have not before them the various parties who have an interest in the question, and have no power to make them parties to the proceeding. *Ibid.*

566. The petition, in a case before the court, is defective, which does not specify what person or persons are owners of the claim, or interested therein. Per Scarburgh, J. *White & Sherwood* v. *The United States.*

567. The allegation in a petition that services, for which the claim is made, were rendered by order of the General Post-office Department, is equivalent to an allegation that such services were rendered by order of the Postmaster-General, and is so understood by the court. *Ibid.*

568. It is not necessary, *it seems*, to set forth in the petition points which are merely matters of proof. Per Gilchrist, P. J. *Noble* v. *The United States.*

569. Where the claim is founded upon an act or acts of Congress, such act or acts, *it seems*, should be stated in the petition. *Ibid.*

570. *It seems*, this court will entertain the petition of one *not a citizen*, and grant him relief upon a claim arising on contract with the United States. Per Gilchrist, P. J. *Porte* v. *The United States.*

571. *It seems*, the court will order the taking of testimony where the facts set forth in the petition of the claimant furnish any ground for relief. Per Scarburgh, J. *Gibbons et al.* v. *The United States.*

572. *It seems*, where by act of Congress it is specially referred to the accounting officers of the Treasury, among other things, to adjust and settle certain claims, which they decline to do, upon review and reversal of such decision, the court proceeds itself to adjust and settle the claims. Per Gilchrist, P. J. *Wigg* v. *The United States.*

573. Where the petitioner claims a right of pre-emption to a tract of land, but admits there are claims thereto antagonistical to his, by parties who do not appear; *Held:* whether he is entitled to a right of pre-emption or not, cannot be determined by this court without investigation, also, into such adverse claims. Per Gilchrist, P. J. *Hale* v. *The United States.*

574. Where a right to enter certain land by pre-emption is asserted, but the court is informed that there are three several claimants thereto; *Held:* this court cannot decide that the claim of the petitioners is the better claim, where the other claimants are not represented, and have had no opportunity of proving that a decision ought not to be made in favor of the petitioner. *Ibid.*

PRECEDENTS.

575. A judicial tribunal or court, in presenting its views of the case decided, may with propriety draw its arguments from any source of which in its discretion it may approve. Per Scarburgh, J. *Wood* v. *United States.*

576. But no motive of public policy can justify or excuse a court where, as in the United States, the executive, legislative, and judiciary departments of government are kept separate and distinct, in attempting, by a decision in one case, to lay down rules to be followed in any other case, not of the same character as the one decided. *Ibid.*

577. In making a decision in one case, no court can rightfully undertake to do more than merely decide *that case.* Its decisions, by virtue of the principle which gives value to a judicial precedent, may be followed, and, when it is the court of the last resort, in most instances ought to be followed in other cases. *Ibid.*

578. A judicial decision is followed, not because the court so orders, but by reason of the merits of the decision as a judicial precedent. It is upon this ground that the decisions of the highest courts become authoritative, and are regarded as evidences of great principles. *Ibid.*

PRE-EMPTION.

579. Where the petitioner claims a right of pre-emption to a tract of land, but admits there are claims thereto antagonistical to his, by parties who do not appear. *Held:* whether he is entitled to a right of pre-emption or not, cannot be determined by this court without investigation, also, into such adverse claims. Per Gilchrist, P. J. *Hale* v. *The United States.*

580. Where a right to enter certain land by pre-emption is asserted, but the court is informed that there are three several claimants thereto; *Held:* this court cannot decide that the claim of the petitioners is the better claim, where the other claimants are not represented, and have had no opportunity of proving that a decision ought not to be made in favor of the petitioner. *Ibid.*

PRIZE OF WAR.

581. Section 5 of the act of April 23, 1800, is substantially a provision that the vessel is to be condemned, or that there is to be a legal adjudication that she is good prize, before the proceeds are to become the property of the captors. Per Same. *Decatur* v. *The United States.*

582. Property captured in war belongs, in the first instance, to the nation: whatever right the captors acquire is derived by grant. The mere taking possession of the property does not of itself vest the title to it in the captors. *Ibid.*

583. As the title to the proceeds or value of a vessel as prize of war depends on a grant, it must conform to the conditions of the grant: which are that the vessel, after having been captured, shall be brought into port, and condemned as lawful prize. *Ibid.*

PUBLIC MONEY.

584. The act of 31st January, 1828, (3 Stat. at Large, 723,) "concerning the disbursement of public money," forbids *advances* of public money in *all* cases; but on contracts for the performance of any service for, or the delivery of articles of any description for the use of the United States, it allows *payment* to be made not exceeding the value of the service rendered, or of the articles delivered *previously* to such payment. Per Scarburgh, J. *Gibbons et al.* v. *The United States.*

585. An *advance* of money on contract, strictly speaking, is a payment made before an equivalent is received. It is such an advance that is forbidden by the act of 31st January, 1823. *Ibid.*

586. The "payment" which the act of 31st January, 1823, contemplates, is a payment for a full equivalent received, as contradistinguished from a payment for an equivalent expected. The former it allows, the latter it forbids. *Ibid.*

587. The act of 31st January, 1823, prescribes three requisites to constitute a valid payment: 1st, that it be a payment in the sense of the statute; 2d, that it be made in a case of contract for the performance of some service for, or the delivery of articles of some description for the use of the United States; and, 3d, that it shall not exceed the value of the service rendered, or of the articles delivered previously to such payment. *Ibid.*

588. Appropriations had been made by act of September 28, 1850 (9 Stat. at Large, 500), and act of March 3, 1851 (9 Stat. at Large, 627), for the erection of several light-houses in California and Oregon, and on April 30, 1852, a contract was made, between the claimants and the Secretary of the Treasury, to carry those acts into effect. The claimants undertook to construct the light-houses, but the work to be done before the materials were actually put into the several structures, was undertaken in part by the United States, and in part by the claimants. The duty of procuring the materials and shipping them was undertaken by the latter. A payment in advance was to be made by the United States to the claimants for the illuminating apparatus, and other materials to be sent from Atlantic ports. The language of the contract on this point was, "that in consideration of the advances of money to be made by the parties of the first part for the illuminating apparatus and other materials for the said several light-houses, to be sent from the Atlantic ports, that," &c. This payment in advance was to be made as soon as the illuminating apparatus, lanterns, &c., should be shipped and insured, and the policy of insurance, accompanied by a duplicate of the bill of lading, assigned and delivered to the United States, and upon the execution and delivery of the penal bond required by the contract. After the delivery of the materials to the collector of the port of San Francisco, they were to remain in his possession until the claimants should require them to be transported to the several places where they were to be used, when they were to be transported to those points under his authority in a revenue cutter of the United States, or other vessel. The claimants insist that, under the proper construction of this contract, upon the assignment of the policy of insurance and the bill of lading to the United States, they became the owners of the materials embraced by those instruments. *Held:* upon the assignment and delivery of the bill of lading and policy of insurance, and the receipt by the claimants of the stipulated payments, the materials became the absolute

property of the United States. Per Scarburgh, J. *Gibbons et al.* v. *The United States.*

589. *Held,* also: the contract was made with reference to the act of January 21, 1823 (3 Stat. at Large, 723), Section 1; it particularly specifies *when* and *for what* the payment in advance was to be made. *Ibid.*

590. *Held,* also: the fair and natural construction of the contract—that which is suggested by the proper signification of the language employed—is entirely consistent with the requirements of the act of January 21, 1823, Section 1. (1.) The payment provided for in it, is precisely the kind of payment contemplated by the act. (2.) It was made for services rendered and articles delivered for the use of the United States. (3.) The services rendered and the articles delivered before the payment was made, may well be presumed to have been considered a fair equivalent for the amount of the payment. *Ibid.*

591. *Held,* also: the articles must be regarded as to be delivered *for the use of* the United States, because an assignment of the bill of lading and of the policy of insurance was the appropriate method, under the circumstances, of such delivery; and so to interpret the contract, is alike consistent with its words and the provisions of the Statute, and any other interpretation would render it violative of the Statute. *Ibid.*

592. *Held,* also: the covenant on the part of the United States to transport the materials from San Francisco to the several places where they were to be used, when required by the claimants, was express and unconditional. *Ibid.*

593. *Held,* also: the law of carriers has no application to the covenant to transport the materials from San Francisco, &c. The United States were in no sense carriers for the

claimants, because the materials to be carried were the property of the United States. *Ibid.*

PURSER'S ACCOUNTS.

594. The claimant, a purser in the Navy during the last war with Great Britain, had charge of the accounts of the officers and men of the Delaware flotilla of gunboats. He received, in his official capacity, from the Government, between 1812 and 1815, money, in treasury notes, to be used in paying persons employed in the naval service. In 1817 he rendered an account, in which he charged for loss sustained by him on the sale of the Treasury notes, which were then at a discount, and which he was compelled to exchange for smaller money to enable him to pay the men. This charge was disallowed at the Treasury. The claim for its allowance, since frequently renewed, was rejected there from time to time, owing to alleged want of proper proof of the loss, and of legal authority to make such an allowance. In 1839 the claimant stated his accounts, and paid into the Treasury the amount so disallowed him. The information on the hearing, furnished from the Treasury Department upon the call of the Court, included the vouchers, &c., of the claimant on file there. From this, it appeared that he had proved to the satisfaction of the department, a loss by the depreciation of $313. He showed, also, by the bills of the brokers, a depreciation of 6 per cent. upon $4,000, amounting to $240—making, in the whole, $553. Objection was made to $82 18 of the $240, by the department, on the ground that upon the vouchers for it the written approval of the commodore, as required by a regulation of the department, was not produced. Its objection was not that the notes, to $4,000, were improperly sold, but that the evidence adduced there did not comply with such regulation. The claimant asks judgment for the amount of his loss by the depreciation of the treasury notes, with interest.

Held: the claimant is entitled to judgment against the United States (which the court rendered in his favor) for $553, the amount proved of his loss by depreciation of the notes, but without interest. Per Gilchrist, P. J. *Todd* v. *The United States.*

595. Also, *held:* it was the duty of the claimant, as purser, to pay off the officers and men of the flotilla so far as the funds furnished him by the government would permit. But the Treasury notes were worth less than their nominal value by 6 *per cent.*, and to the extent of 6 *per cent.*, on the amount, the purser may be considered as having paid his own money. *Ibid.*

596. Also, *held:* the Treasury notes, to $4,000, having been sold by brokers, their accounts of sales, duly proved, are competent evidence, and the best evidence the nature of the case admits of, to prove the extent of the depreciation. *Ibid.*

597. *Held*, also: that before his accounts were stated on Nov. 11, 1839, the facts in this case would have been sufficient to support an action for money paid, and after that date, and after he had paid the money into the Treasury, the facts would support an action for money had and received. *Ibid.*

598. Also, *held:* the approval of the commodore upon the vouchers is to be regarded only as required by a rule of convenience at the Treasury, and cannot be considered in a court of law as a rule of evidence. *Ibid.*

599. If the accounts of an officer (purser in the navy) be substantially correct, he is not to be subjected to the charge of gross negligence because ignorant of merely formal rules of proof required by the Department, but not by an act of Congress. *Ibid.*

REAL ESTATE.

600. The United States Marshal for Mississippi, under Section 1 of the act of May 7, 1800, (2 Stat. at Large, 61,) sold certain real estate on behalf of the United States, and the claimant, a partner in the purchase on such sale, paid as consideration the sum of $5,000, which passed into the Treasury, but, subsequently to such payment, ascertained that the lands, sold as the property of one Harris through whom the United States derived title, in fact belonged to other persons, and that Harris never had any title to them, and consequently no title passed by virtue of such sale by the United States; and said sale was made without notice of any defect in the title. *Held:* the claimant is not legally entitled to recover back from the United States the $5,000, so paid by him. Per Gilchrist, P. J. *Puckett* v. *The United States.*

601. An assurance given by the marshal, on such sale, "that he would make title at a future day," cannot be the foundation of a right in the claimant to recover back the consideration paid by him. Where the marshal steps out of his official duty, his declarations cannot bind the United States. *Ibid.*

602. In a sale made on behalf of the United States, under Section 1 of the act of May 7, 1800, (presuming it to have been a judicial sale,) there was no implied warranty of title; neither the marshal nor auctioneer, while acting within the scope of their authority, could be considered as warranting the property sold, nor could the marshal do any act that would expressly or impliedly bind the United States by warranty. *Ibid.*

603. In a sale, under Section 1 of the act of May 7, 1800, the grantee bought only what the United States had the right

to sell; and where, without fraud, they sold only their interest, the consideration cannot be said to have failed with the title, so as to give a right of action against them to their grantees. *Ibid.*

604. The evident intention of the treaty of August 9, 1814, (7 Stat. at Large, 120,) with the Creek Indians, is not to give to the *reservee* an estate in fee simple in the land, but merely a right of occupancy. Per Same. *Lindsay* v. *The United States.*

605. Under said treaty of August 9, 1814, the *contingent* interest of the United States in reservations of land to any chief or warrior of the Creek nation, does not depend merely upon the construction of the words "voluntary abandonment." *Ibid.*

REFERENCE.

606. The application of principles of law in this court is equally necessary in regard to the claims referred to it by "either House of Congress" as in those of which the court has jurisdiction apart from such a reference. Per Same. *Todd* v. *The United States.*

607. When Congress has conferred upon an individual, or a board, or a department, the power to examine and decide a matter, and the matter has been decided, is such decision final? *Quere.* Per Same. *Wigg* v. *The United States.*

608. *It seems*, where by act of Congress it is specially referred to the accounting officers of the Treasury, among other things, to adjust and settle certain claims, which they decline to do, upon review and reversal of such decision, the court proceeds itself to adjust and settle the claims. *Ibid.*

REGULATIONS OF DEPARTMENTS.

609. If a claim be alleged to be founded upon any "regulation of an Executive department," this Court will construe such regulation and ascertain its meaning by the same rules of construction as are applicable to statutes. Per Gilchrist, P. J. *Todd* v. *The United States.*

610. Rules in force at the Treasury Department for the methodical conduct of business there, cannot, in a suit in this court, supersede the ordinary principles and requirements of the law of evidence, nor can they add anything to what the law requires of a claimant in this court to make out his case. *Ibid.*

611. The "accounting officers" of the Treasury cannot superadd a condition not required by the act of Congress, which is supreme in matters of legislation. Departmental regulations must be in subordination to the law of Congress. Per Same. *Magruder* v. *The United States.* Second Opinion.

612. It is the duty of the Departments to administer the law, and not to make it. They stand, in relation thereto, so far upon the same ground with this Court, and with the judiciary in general. *Ibid.*

613. This Court may adopt rules of practice, and the departments make regulations, but they must be in strict subordination to law; wherever there is any antagonism between them, the "rules of practice" and "regulations" must yield, and the law of Congress govern. *Ibid.*

614. Where an Act of Congress requiring the Secretary of the Treasury to adjust and settle certain claims, does not prescribe the character of the proof, or upon what evidence he

shall adjust and settle them, it is his duty to adopt the appropriate means, and to prescribe the necessary regulations. He may prescribe such rules and modes of legal proof as appear to him to be judicious. Per Same. *Noble* v. *The United States.*

615. The regulation of the Treasury Department, which provides that the officer shall not be paid for performing the duties of a higher grade, unless he produces a *written* appointment to perform such duties, prescribes a condition not required by that Act, which admits any legal evidence, while the regulation excludes it. Per Same. *Magruder* v. *The United States.* Second Opinion.

616. Under peculiar circumstances, a wanton disregard of the rules of the Treasury Department might be indicative of fraud, or of such gross negligence in the claimant as might authorize the rejection of his claim in this court. Per Same. *Todd* v. *The United States.*

617. If the accounts of an officer (purser in the navy) be substantially correct, he is not to be subjected to the charge of gross negligence because ignorant of merely formal rules of proof required by the Department, but not by an act of Congress. *Ibid.*

618. *It seems* where the claimant upon petition makes out his case against the United States, the court grants relief, notwithstanding a previous decision of the War Department that the claimant could not receive the compensation sought under a resolution and act of Congress, through the instrumentality of the Department, on account of its existing regulations. Per Gilchrist, P. J. *Beaugrand* v. *The United States.*

619. The regulation of the Treasury Department, by which duties on imported liquors were required to be computed on

the *invoice* quantity, was in conflict with law and invalid. Per Scarburgh, J. *Sturges et al.* v. *The United States.*

620. Although the Secretary of the Treasury, in the exercise of his discretion, may adopt necessary forms and modes of giving effect to the law, yet neither he nor those who act under him can dispense with or alter any of its provisions. *Ibid.*

REVOLUTIONARY CLAIMS.

621. A commissioned surgeon rendered medical services to the United States, and in their employ, as surgeon of a regiment of artificers, during the Revolution, and up to March 29, 1781; *Held:* he was included in the class of "regimental surgeons" under the resolution of Congress of Sept. 30, 1780, which provided for "the pay and establishment of the officers of the Hospital department and medical staff." Per Gilchrist, P. J. *Baird* v. *The United States.*

622. The body of artificers attached to the army during the Revolution, in resolutions of Congress is called a regiment, and is declared to be a part of the regular army; the surgeon of it, therefore, was a "regimental surgeon." *Ibid.*

623. As regimental surgeon, he was an "officer" under the resolution of Congress of Jan. 17, 1781, which provided that the "officers reduced" should be entitled to "half-pay for life." *Ibid.*

624. The party for whose estate this claim is made by petitioner as administrator, was surgeon of the regiment of artificers in the army of our Revolution from March 20, 1780, and served in that capacity until the regiment was reduced, March 29, 1781, and died October 27, 1805; *Held:* his half-

pay was $240 per annum, payable at the end of every year. He was entitled to this from March 29, 1783, up to October 27, 1805, the day of his death, and interest on the payments as they became due. There was, therefore, due him at the time of his death $10,074 84; and this sum is due his estate, with interest thereon from that date, October 27, 1805. *Ibid.*

625. The resolution of Congress of June 3, 1784, that "an interest of six per cent. per annum should be allowed to all creditors of the United States, for supplies furnished or services done from the time the payment became due," was a voluntary contract on the part of the United States, constituting a legal claim against them, from which no subsequent legislation could release them without the assent of the other party. *Ibid.*

SALARIED OFFICERS.

626. Where the United States Secretary of Legation to Chili, commissioned in 1850, rendered *extra services* in arranging the papers and records of the office of Legation, and making necessary indexes therefor; *Held:* that as a public officer, with a regular or fixed salary, the act of August 23, 1842 (5 Stat. at Large, 510), is applicable to his case, and he has, therefore, no legal demand against the United States for such extra services. Per Blackford, J. *Holman's Administrator* v. *The United States.*

627. Section 3 of the act of March 3, 1839, (5 Stat. at Large, 349,) goes no farther than Section 2 of the act of March 3, 1835. It provides that no person, whose salary as an officer of the Government is fixed by law, shall receive any extra allowance or compensation, in any form whatever, for the performance of any service, unless such allowance be authorized by law. Per Gilchrist, P. J. *Chase* v. *The United States.*

SECRETARY OF THE TREASURY.

628. Where an act of Congress, requiring the Secretary of the Treasury to adjust and settle certain claims, does not prescribe the character of the proof, or upon what evidence he shall adjust and settle them, it is his duty to adopt the appropriate means, and to prescribe the necessary regulations. He may prescribe such rules and modes of legal proof as appear to him to be judicious. Per Same. *Noble* v. *The United States.*

629. Where an act of Congress provides that a sum of money shall be paid upon the production of certain proof, the Secretary of the Treasury cannot superadd, *it seems*, a requirement of further proof not required by the act. *Ibid.*

SERVICES.

630. No one but the head of a department, bureau or office at the seat of Government, can under any circumstances contract for the services of an extra clerk on account of the Government, in such department, bureau or office. Per Blackford, J. *McElderry* v. *The United States.*

631. *It seems*, proof of voluntary services as extra clerk in a "department, bureau or office at the seat of Government," rendered with the knowledge of an agent of the Government authorized by law to assent either expressly or impliedly to the performance of those services, will sustain a claim for compensation against the United States. *Ibid.*

632. Where such voluntary services as extra clerk are performed, but not "with the knowledge of an agent of the Government authorized by law to assent either expressly or

impliedly to the performance of those services;" *Held:* there exists no claim for compensation against, or contract with, the United States. *Ibid.*

633. It seems the head of a department, bureau or office at the seat of Government, can contract for the services of an extra clerk in such department, bureau or office, only during the session of Congress, or when the services of such extra clerk are indispensably necessary to enable such department, bureau or office to answer some call made by either house of Congress at one session to be answered at another. *Ibid.*

634. *It seems*, a contract for services as extra clerk in a department, bureau or office at the seat of Government, entered into by the head of such department, bureau or office, not in accordance with the provisions of the special appropriation act of August 26, 1842, Section 15 (5 Stat. at Large, 526,) is in violation of such act and void as against the United States. *Ibid.*

635. By the plain and obvious meaning, and the words, of Section 1 of the act of March 3, 1835 (4 Stat. at Large, 756,) if an officer of the Navy temporarily performs the duties belonging to a higher grade, he is entitled to increased compensation. Per Gilchrist, P. J. *Magruder* v. *The United States.* Second Opinion.

636. Section 3 of the act of March 3, 1839 (5 Stat. at Large, 349,) goes no farther than Section 2 of the act of March 3, 1835. It provides that no person, whose salary as an officer of the Government is fixed by law, shall receive any extra allowance or compensation, in any form whatever, for the performance of any service, unless such allowance be authorized by law. Per Same. *Chase* v. *The United States.*

637. The act of 1836, establishing the office of Auditor of

the Treasury for the Post Office Department, gives no authority to any person to employ the messengers in said Auditor's office to perform extra services. Per Blackford, J. *Cox* v. *The United States.*

638. The 11th Section of the act of August 26, 1842, (5 Stat. at Large, 525,) is *prospective* only. *Ibid.*

639. The 11th Section of the said act of August 26, 1842, permits the employment of messengers to perform extra services, but it is silent as to the person who shall have authority to employ them. *Ibid.*

640. The Secretary of the Treasury being the head of the department to which the office of Auditor of the Treasury for the Post Office Department is attached, and having the exclusive authority to appoint the clerks and messengers of that office, is the proper person to contract for extra services by messengers in said office. *Ibid.*

641. The fact that extra work was done by authority of the Auditor of the Treasury for the Post Office Department, who officially acts under and for the Secretary of the Treasury, is not evidence that the Secretary employed or authorized such extra service. *Ibid.*

642. Where the petitioners, an assistant messenger and a laborer, employed in the General Post Office Department during the whole term, from January 1, 1839, to January 1, 1843, by order of that Department, rendered extra services beyond the particular duties of their respective stations; *Held:* so much of their claim for such extra services as is for services rendered after the acts of March 3, 1839, of August 23, 1842, and of August 26, 1842, were passed, cannot be allowed, as such an allowance is by said acts expressly forbidden; *aliter* as to so much of their claim as is based on services

rendered between January 1 and March 3, 1839, upon which the claimants are entitled to relief. Per Scarburgh, J. *White & Sherwood* v. *The United States.*

643. The language of each of the acts of March 3, 1839 (5 Stat. at Large, 349,) of August 23, 1842, (5 Stat. at Large, 510,) and of August 26, 1842 (5 Stat. at Large, 525,) is broad and comprehensive enough to include both an assistant messenger and a laborer. *Ibid.*

644. Prior to the passage of these acts (of March 3, 1839, of August 23, 1842, and of August 26, 1842,) it was the practice of the Government, sanctioned by judicial authority, to allow compensation for such extra services. *Ibid.*

645. Where the claimant, in May and June, 1853, rendered services in the office of Fourth Auditor of the Treasury, although he was not employed by the head of the department, but voluntarily tendered his services, and was merely permitted by the Auditor to perform them in his office; *Held:* this is not to be considered as an employment in the sense of the act of August 26, 1842, Section 15 (5 Stat. at Large, 526,) and for that reason no legal liability, on the part of the United States, to make the petitioner compensation for his services, can result from it. Per Scarburgh, J. *Boyd* v. *The United States.*

646. To sustain the claim for such voluntary services, would be to sustain an evasion and consequent virtual violation of said act of August 26, 1842, and in effect to legalize what that act expressly forbids. *Ibid.*

647. The claimant, while Chief Clerk in the Treasury Department, at different periods between April 24, 1829, and May 31, 1833, acted as Secretary of the Treasury, performing the duties of the office, by authority of the President of the

United States, on account of the absence from the seat of Government or sickness of the Secretary of the Treasury. *Held:* the claimant, at the time he so performed the duties of Secretary of the Treasury, held an office separate from his office of Chief Clerk—that is, held two offices, there being at the time no law to prohibit him from doing so, and as he discharged the duties of both offices, is entitled to compensation accordingly. Per Blackford, J. *Dickins* v. *The United States.*

648. The claimant, while Chief Clerk in the State Department, at different periods between August 10, 1833, and November 9, 1836, was Acting Secretary of State, performing the duties of the office by authority of the President of the United States, on account of the absence or sickness of the Secretary of State. *Held:* the claimant, at the times he so performed the duties of Secretary of State, held an office separate from his office of Chief Clerk; that is, held two offices, and as he discharged the duties of both is entitled to compensation accordingly. *Ibid.*

649. The meaning, so far, of Section 9 of the act of April 20, 1818 (3 Stat. at Large, 447,) is that no clerk therein referred to shall receive as such any other compensation than what that act allows. It does not affect, *it seems*, the question whether he is not entitled, besides his salary as clerk, to a compensation, and if any, to what amount, for his discharge of the duties, at the same time, of other offices legally conferred upon him. *Ibid.*

650. Where the President of the United States, under the act of May 8, 1792 (1 Stat. at Large, 281,) authorizes any one to perform the duties, in case of absence or sickness, of Secretary of State, of Secretary of the Treasury, or of Secretary of War, the one so authorized is, *it seems*, entitled to receive for his services as acting Secretary of State, acting Secretary of the Treasury, or acting Secretary of War, the same compen-

sation for the time he so acted which the law then allowed to the Secretaries of State, of the Treasury, and of War, respectively. *Ibid.*

STATUTORY CONSTRUCTION.

651. There is no mysterious art to be applied to the exposition of statutes. It is to be presumed that the Legislature intend that words used in a statute shall have their natural effect. Per Gilchrist, P. J. *Wigg* v. *The United States.*

652. The meaning of the Legislature is to be ascertained from the language of the statute, and it is not to be supposed that they have used words without intending to convey any idea. *Ibid.*

653. The whole purpose of Congress, as expressed in the statute, is to be carried into effect i possible, and no clause is to be rejected, unless it is necessary in order to accomplish the object intended by the Legislature. *Ibid.*

654. Where the words of a statute are plain, this court cannot intend that the Legislature meant anything more than it has expressed. Per Scarburgh, J. *Beatty's Executor* v. *The United States.*

655. In the construction of a statute, when words of a plain and definite import have been used, this court is not at liberty to disregard them; the only safe course in such case, is to adhere to the words, and to *collect* the intention of the Legislature from them. *Ibid.*

656. This court is not at liberty to *presume* the intentions of the Legislature, and has nothing to do with the policy of the law. *Ibid.*

657. Judges are "not to construe statutes by equity, but to collect the sense of the Legislature by a sound interpretation of its language, according to reason and grammatical correctness." *Ibid.*

658. In the construction of a statute, this court can only declare what it is, not what it ought to be. *Ibid.*

659. Such a construction of a statute as sacrifices sense to sound, which causes the words of the statute to predominate without regard to the meaning of the law, is always to be avoided if possible. Per Gilchrist, P. J. *Chase* v. *The United States.*

660. When such a construction would not express the meaning of Congress, consistently with the received rules of interpretation, the court must ascertain the mischief, if any, which the act was intended to remedy, and endeavor to perceive its meaning by the light which that consideration will throw upon it. *Ibid.*

661. The meaning of a statute is to be ascertained from the language used, and not by inquiring of the individual members of the Legislature what they intended by enacting the law. Per Gilchrist, P. J. *Nicholson* v. *The United States.*

662. If Congress pass a law, the natural import of which is different from the effect intended to be given to it by those who voted for it, the only safe rule is to take the act as it stands, as conveying the intention of Congress. *Ibid.*

663. In the joint resolution of July 20, 1854, the word "officer," and the word "employé," are terms of the most general and comprehensive character. There is nothing in the resolution to modify them, or to limit their application to officers or employés of any particular description. *Ibid.*

664. The pension laws are beneficial in their nature, and are, therefore, to be construed beneficially in matters of inevitable doubt. Per Same. *Accardi* v. *The United States.*

SURGEONS.

665. The petitioner, a major in the army, claims from the United States $150, paid for medical services. The engineer department was entitled to the services of a surgeon. None could be procured. The Commodore permitted Dr. W., an assistant surgeon in the navy (to whom the $150 were paid), to attend. He was not ordered to it. It was no part of his duty. The claimant, as senior officer, employed him and made the contract with him, which was approved by the engineer department. The charge was disallowed at the Treasury, on the ground that Dr. W., as an assistant surgeon in the navy, was prohibited, under Section 2 of the act of March 3, 1835 (4 Stat. at Large, 757), and also by Section 3 of the act of March 3, 1839 (5 Stat. at Large, 349), from receiving the allowance. *Held:* that the true construction of the act of March 3, 1835, did not prohibit Dr. W. from receiving compensation for his services not within the line of his duty, from third persons; that the petitioner lawfully paid him the sum claimed, and has a right to have the said sum ($150) credited to him, the petitioner, by the United States. Per Gilchrist, P. J. *Chase* v. *The United States.*

666. In such case Dr. W., although an assistant surgeon in the navy, was *pro hac vice* simply a citizen. He neglected no duty, and violated no principle, in performing the service in question. *Ibid.*

667. The regulation of the army No. 1,259 (Army Regulations, 331), authorizes the *senior* officer "when medical or

surgical aid is required, if no surgeon or assistant surgeon of the army be at or near the place," to procure such aid, and imposes no limitation upon him in the exercise of his authority to do so. *Ibid.*

TREASURY DEPARTMENT.

668. As far back as the year 1819, *refusal* to allow interest was the *usual practice* of the Treasury Department, and this practice has existed to the present time, except when dispensed with by some special law. Per Gilchrist, P. J. *Todd* v. *The United States.*

669. The "accounting officers" of the Treasury cannot superadd a condition not required by the act of Congress, which is supreme in matters of legislation. Departmental regulations must be in subordination to the law of Congress. Per Same. *Magruder* v. *The United States.* Second Opinion.

670. *It seems*, the court will review the construction given to a statute by the accounting officers of the Treasury in the discharge of official duty, where they have *declined to act* under it, even in a matter specially referred by act of Congress to be adjusted by them. Per Same. *Wigg* v. *The United States.*

671. Where an act of Congress requiring the Secretary of the Treasury to adjust and settle certain claims, does not prescribe the character of the proof, or upon what evidence he shall adjust and settle them, it is his duty to adopt the appropriate means, and to prescribe the necessary regulations. He may prescribe such rules and modes of legal proof as appear to him to be judicious. Per Same. *Noble* v. *The United States.*

672. Where an act of Congress provides that a sum of

money shall be paid upon the production of certain proof, the Secretary of the Treasury cannot superadd, *it seems*, a requirement of further proof not required by the act. *Ibid.*

673. Rules in force at the Treasury Department for the methodical conduct of business there, cannot, in a suit in this court, supersede the ordinary principles and requirements of the law of evidence, nor can they add anything to what the law requires of a claimant in this court to make out his case. Per Same. *Todd* v. *The United States.*

674. The approval of the commodore upon vouchers of a purser in the navy as to expenditures is to be regarded only as required by a rule of convenience at the Treasury, but cannot be considered in this court as in itself evidence. *Ibid.*

675. Under peculiar circumstances, a wanton disregard of the rules of the Treasury Department might be indicative of fraud, or of such gross negligence in the claimant as might authorize the rejection of his claim in this court. *Ibid.*

676. *It seems*, where by act of Congress it is specially referred to the accounting officers of the Treasury, among other things, to adjust and settle certain claims, which they decline to do, upon review and reversal of such decision, the court proceeds itself to adjust and settle the claims. Per Same. *Wigg* v. *The United States.*

677. The claimant, while Chief Clerk in the Treasury Department, at different periods between April 24, 1829, and May 31, 1833, acted as Secretary of the Treasury, performing the duties of the office, by authority of the President of the United States, on account of the absence from the seat of Government or sickness of the Secretary of the Treasury. *Held:* the claimant, at the times he so performed the duties

of Secretary of the Treasury, held an office separate from his office of Chief Clerk—that is, held two offices, there being a the time no law to prohibit him from doing so, and as he discharged the duties of both offices, is entitled to compensation accordingly. Per Blackford, J. *Dickins* v. *The United States.*

TREATIES.

I. Treaty of 1819 with Spain.
II. Indian Treaties.
III. Miscellaneous.

I. Treaty of 1819 with Spain.

678. The Treaty of 1819 between the United States and Spain, for the cession of the Floridas, did not provide a tribunal by which the claims, on account of injuries suffered by the operations of the American army in Florida, should be decided. Per Blackford, J. *Humphrey's Adm'x* v. *The United States.*

679. The appointment of such a tribunal was left, by said Treaty of 1819, to be made by the Government of the United States; and it was in consequence of the Treaty, in that respect, that the act of March 3, 1823 (3 Stat. at Large, 768), was passed. *Ibid.*

680. In consequence of the decision of the Secretary of the Treasury, that the said Treaty of 1819 did not apply to the injuries of 1812 and 1813, the act of June 26, 1834 (6 St. at Large, 569), was passed, which provided for the injuries committed in 1812 and 1813. *Ibid.*

681. The said acts of March 3, 1823, and June 26, 1834, must be considered as if their provisions were contained in the same act. The object of both acts is the same,—to furnish an appropriate remedy by which the injuries mentioned in the last clause of article 9 of the Treaty with Spain of 1819, might be established, and the satisfaction there alluded to be obtained. *Ibid.*

682. The tribunal created by the said act of March 3, 1823, and recognized by the act of June 26, 1834, consisted of two parts, the Judge in Florida constituting one, and the Secretary of the Treasury the other. *Ibid.*

683. The tribunal so constituted was in accordance with article 9 of the Treaty of 1819 with Spain, which required that the injuries should be established "by process of law." *Ibid.*

684. It was for Congress, under article 9 of the Treaty of 1819 with Spain, to provide a tribunal before which the claimants might have an opportunity to establish their respective claims. The tribunal, constituted under the acts of March 3, 1823, and June 26, 1834, was such a one; where, although not an ordinary Court of Justice (the Treaty did not require it to be so), every claimant could have his claim fairly adjusted, and its merits decided, upon such evidence as he himself might think proper to furnish. *Ibid.*

685. The authority to adjust claims for injuries, under article 9 of the Treaty of 1819 with Spain, was not, by the acts of March 3, 1823, and June 26, 1834, given to the courts in Florida, but to the judges respectively. It is not judicial power, properly speaking, but that of a *Commissioner* only, that was conferred. *Ibid.*

686. The judge of either of the Superior Courts in Florida,

in the adjustment of claims for injuries under article 9 of the Treaty of 1819 with Spain, acted merely as a *Commissioner*, and not as a court, and the power to review his decisions, given by act of Congress to the Secretary of the Treasury, was, therefore, unobjectionable. *Ibid.*

687. The act of March 3, 1823, made it the duty of the Secretary of the Treasury to revise the respective decisions of the judges in Florida, and not to pay any allowance of either of them which he did not find to be just and equitable. His authority was not limited to determine whether or not a case for injury presented was within the provisions of the Treaty of 1819. *Ibid.*

688. The decision of the judge could have no effect, under the act of March 3, 1823, until the Secretary of the Treasury had decided upon the justice and equity of the claim. *Ibid.*

689. The provision of the act of March 3, 1823, giving a revisory power as to decisions of the judges in Florida upon claims for injury, is consistent with the Treaty with Spain of 1819. *Ibid.*

690. The stipulation in article 9 of the Treaty of 1819 with Spain, that the United States would cause satisfaction to be made in certain cases, was a contract to be executed by Congress. *Ibid.*

691. Congress, in the exercise, then, of its exclusive jurisdiction under article 9 of the Treaty with Spain of 1819, created a tribunal for the special purpose of determining cases arising under that article of the Treaty; and this court cannot lessen or otherwise interfere with the powers of that tribunal. *Ibid.*

692. After the passage of the acts of March 3, 1823,

and of June 26, 1834, providing for the settlement of claims under the Treaty with Spain of 1819, and within the time limited, the claimant, as administratrix of A., presented a claim under said acts to the judge of the Superior Court at St. Augustine. The judge examined the case, and on August 15, 1839, rendered a decree in favor of the claimant for $3,800, with interest at 5 *per cent. per annum* from May 10, 1813. The judge soon after certified the proceedings, with the evidence in the case, to the Secretary of the Treasury, as the said acts required. The then Secretary, on November 28, 1839, *approved* the said decree, or award, of the judge to $2,300, *without interest*—which was accordingly paid to the claimant. Afterwards, in September, 1852, the then Secretary made a further decision in the case, allowing the additional sum of $1,500 included in said award, as justly due to the claimant, but also *without interest*, "as the balance in full of the entire claim," which $1,500 was also accordingly paid. The award of the judge, therefore, so far as regards the principal sum, was approved by the Secretary of the Treasury and the money paid, but, so far as regards the interest, the award was disallowed. The claimant now petitions, in order to recover the interest which the Secretary so refused to pay, with damages for its non-payment; *Held:* the decision of the Secretary of the Treasury against the claim for interest being final, the claimant has no ground for relief. *Ibid.*

693. The decision, upon the law and facts, of the Secretary of the Treasury against a claimant, under art. 9 of the Treaty with Spain of 1819, is the decision of a competent tribunal of exclusive jurisdiction, and puts an end to the demand, both as to principal and interest. It stands upon the same ground with the decision of a Board of Commissioners, appointed by or under a treaty, to determine upon the amount and validity of similar claims. *Ibid.*

694. The final decision of the Board of Commissioners,

under our treaty of 22d February, 1819, with Spain, disallowing a claim, must be taken to be correct—the judgment of a judicial tribunal of exclusive jurisdiction, without appeal; and a complete bar to any reconsideration of such claim by the court. Per Blackford, J. *Thomas* v. *The United States.*

695. Previous to our treaty of 22d February, 1819, with Spain, a claim for the redress of the illegal seizure and condemnation of an American vessel by Spanish authorities could be preferred only against the nation that had committed the injury. Per Same. *Thomas* v. *The United States.*

II. Indian Treaties.

696. The evident intention of the treaty of August 9, 1814 (7 Stat. at Large, 120), with the Creek Indians, is not to give to the *reservee* an estate in fee simple in the land, but merely a right of occupancy. Per Gilchrist, P. J. *Lindsay* v. *The United States.*

697. Under said treaty of August 9, 1814, the *contingent* interest of the United States in reservations of land to any chief or warrior of the Creek nation, does not depend merely upon the construction of the words "voluntary abandonment." *Ibid.*

698. *It seems*, the act of March 3, 1817 (3 Stat. at Large, 380), was intended as declaratory of the *meaning* of said treaty of August 9, 1814, with the Creeks. *Ibid.*

699. Where chiefs of the Creek tribe obtained, under the treaty of August 9, 1814, a cession of lands, which they subsequently occupied, and afterwards, during their lives, for a valuable consideration, sold, without fraud and in good faith on the part of their grantees, assigning as a title their certificate of reservation, and such lands passed to the claimant by

subsequent intermediate conveyances in fee, also for a valuable consideration, without fraud and in good faith; *Held:* the claimant has no *legal* cause of action against the United States, and they are not bound to convey to him their interest in the lands. *Ibid.*

700. The effect of the sale in such case by the *reservees*, was to give to the United States a legal right to the land, which they had not before the sale. *Ibid.*

III. Miscellaneous.

701. Are the United States bound to pay interest under the name of "damage," or "injuries," or "indemnity," or "satisfaction," or "redress," or corresponding words in treaty stipulations? *Quere.* Per Gilchrist, P. J. *Todd* v. *The United States.*

702. The Board of Commissioners under the convention of 1831 with France, had exclusive jurisdiction, under the act of Congress, of the cases referred, and there is no law giving an appeal from its judgment to any other tribunal. Per Blackford, J. *Roberts* v. *The United States.*

703. The decision of the Commissioners to carry into effect the treaty of 1831 with France against a claim, like the judgment of a court of competent jurisdiction, is a bar to a petition in this court for the same demand. *Ibid.*

704. "When the terms of a treaty stipulation import a contract—when either of the parties thereby engages to perform a particular act, the treaty addresses itself to the political, not to the judicial department, and the Legislature must execute the contract before it can become a rule for the court." Per Blackford, J. *Humphrey's Administratrix* v. *The United States.*

USAGE.

705. The right to interest is wholly conventional in its origin, as it depends upon law and usage; where they are not found the right cannot be said to exist. Per Gilchrist, P. J. *Todd* v. *The United States.*

706. The liability of the United States to pay interest cannot be founded on such a usage as enters into, and forms a part of the contracts of individuals; the usage is directly and expressly the reverse. *Ibid.*

707. The Government has not only omitted to pay interest, but for the greater part of a century it has expressly refused to pay it. *Ibid.*

708. *It seems*, as long ago as the year 1810, *a refusal* to allow interest was the usual practice of the Treasury Department, and this practice has existed to the present time, except when dispensed with by some special law. *Ibid.*

709. The measurement by gauge is, under the acts of Congress, and according to the usage of the United States for more than half a century, the proper *legal* method for ascertaining the *quantity* of liquors imported. *Ibid.*

WAR.

710. During the war between the United States and Tripoli, Lieut. Decatur, in command of the Enterprize, boarded and destroyed the frigate Philadelphia (which had been captured by the enemy, and was then moored in the harbor, under the batteries of Tripoli,) but under peremptory orders to set her on fire, and after blowing out her bottom, to abandon her;

held: these orders were inconsistent with and excluded the idea of a *capture;* the duty which he performed was that of her destruction, and not of her capture. Per Gilchrist, P. J. *Decatur* v. *The United States.*

711. Lieut. Decatur, according to the facts and under his orders, did not *capture* the Philadelphia in a sense which entitled him to her proceeds or value as prize of war, within the meaning of the act of April 23, 1800 (2 Stat. at Large, 52,) and the claimant, his representative, has no legal cause of action against the United States. *Ibid.*

712. Pursuant to his orders, Lieut. Decatur retained possession of the Philadelphia only so long as was necessary to enable him to take the proper measures for her destruction; his possession of her was incidental, and was one of the means adopted to effect the main purpose. *Held:* it was intended, not to obtain the possession for the purpose of bringing the frigate in and obtaining a decree of condemnation, but for the mere purpose of her destruction. *Ibid.*

713. The question, in the case, is not whether the Philadelphia was captured in a legal sense, but whether the claim to her proceeds or value as prize of war, is in the nature of the legal right secured by the prize act of 1800. That claim is not to be determined by the law of nations, but by the true intent and meaning of the act of Congress. *Ibid.*

714. Section 5 of the act of April 23, 1800, is substantially a provision that the vessel is to be condemned, or that there is to be a legal adjudication that she is good prize, before the proceeds are to become the property of the captors. *Ibid.*

715. Property captured in war belongs, in the first instance, to the nation: whatever right the captors acquire is derived

by grant. The mere taking possession of the property does not of itself vest the title to it in the captors. *Ibid.*

716. As the title to the proceeds or value of a vessel as prize of war depends on a grant, it must conform to the conditions of the grant; which are that the vessel, after having been captured, shall be brought into port, and condemned as lawful prize. *Ibid.*

717. In a state of war, any violation of the neutrality of a neutral port by a belligerent, is a breach of the law of nations. Per Gilchrist, P. J. *Owners of the brig Armstrong* v. *The United States.*

718. It is not lawful to make neutral territory the scene of hostility, or to attack an enemy while within it; and if the enemy be attacked, or any capture made under neutral protection, the neutral is bound to redress the injury and effect restitution. *Ibid.*

719. If the party, belonging to a belligerent power, attacked in a neutral port, merely exercises the right of self-defence, that cannot be a cause of complaint as violating the rights of the neutral. *Ibid.*

720. Firing the first shot in such a case, in self-defence, is, *it seems*, not an aggression, but justified by reason and law. *Ibid.*

721. The act of sending out boats, by a belligerent in a neutral port, to effect a capture, is in itself an act directly hostile, a violation of neutrality and within the prohibition of the law of nations. *Ibid.*

722. The neutral, *it seems*, is obliged to give pecuniary indemnification for damages and material losses that may have

been caused in her ports by one belligerent to another, even where it can be shown that she used all the means at her disposal to give protection. *Ibid.*

723. As it is the duty of the neutral to use her utmost endeavors to give protection to belligerents within her ports, it follows that she must do it at her own expense, even by going to war if other means are not sufficient. *Ibid.*

724. Our army, while in actual possession in Mexico, by the law of nations had a right to seize the property of the Mexican Government as lawful prize. Per Gilchrist, P. J. *Porte* v. *The United States.*

725. During such occupation, our officer or officers commanding at Puebla, or elsewhere, had there, for the time being, supreme civil and military authority, and in their existing capacity, represented the United States, whose officers and servants they were. *Ibid.*

726. *It seems*, where there exists a military occupation, as that of Mexico by our forces, the laws of the conquered country are silent in the presence of the victorious army. *Ibid.*

727. Mexico, in our war with her, so far as she was occupied by a competent military force, was for the time a conquered country, and all ordinary civil jurisdiction and remedies were merged in the rights of conquest. *Ibid.*

728. In a state of war we have, as a nation, the right to deprive our enemy of his possessions, of everything which may augment his strength and enable him to make war. *Ibid.*

729. All movable property taken from the enemy in war comes under the denomination of booty, which naturally be-

longs to the sovereign making war, and is vested in him from the moment it comes into his power. *Ibid.*

730. In a state resulting from a state of war, if property be seized under an erroneous supposition that it belongs to the enemy, it may be liberated by the proper authorities, but no action can be maintained against the party who has taken it in a court of law. *Ibid.*

731. In all that the commanding officer does in an enemy's country, so far as he is justified by the law of nations, he represents the country by whose authority he is there in command of a military force. *Ibid.*

732. In a state of war, where the ordinary tribunals are silent, a nation incurs the risk of pecuniary liability for the acts of its officers in the enemy's country, who must act with promptness and decision, without the experience or legal skill which, at home and in a time of peace, are applied to the ascertainment of legal rights; their course of conduct must be determined by what seems best under existing circumstances. *Ibid.*

733. It is the nation that carries on the war, and not the individual officer, and it follows that the nation is liable for the acts of such agents as it sees fit to employ in the prosecution of its object. *Ibid.*

734. The claimant, a captain in our service, during the war with Mexico, while in the active performance of his duty, moving rapidly from place to place, under orders, was, in 1846, taken prisoner at Encarnacion. Under the circumstances, all the baggage and property which he had with him in Mexico were lost, including many valuable papers. Their actual cost amounted, as alleged, to upward of $1,370. The claimant seeks to recover the amount from the United States.

Held: The claim, being for the value of goods taken by the enemy in time of war, cannot be sustained. Per Blackford, J. *Clay* v. *The United States.*

WAR DEPARTMENT.

735. *It seems*, where the claimant upon petition makes out his case against the United States, the court grants relief, notwithstanding a previous decision of the War Department that the claimant could not receive the compensation sought under a resolution and act of Congress, through the instrumentality of the Department, on account of its existing regulations. Per Gilchrist, P. J. *Beaugrand* v. *The United States.*

OPINIONS.

THE space at my disposal admits of the insertion at length, of only a few of the numerous opinions embraced in the Digest. I have made a selection of nine leading cases, in at least eight of which, respectively, the points decided are of immediate practical importance to a large class of claimants. For example: the question as to the allowance of interest is discussed and disposed of in *Todd* v. *The United States*. The subject of half-pay for Revolutionary services is passed upon, in favor of the officers or their representatives, in *Baird* v. *The United States*. The cases, *Roberts* v. *The United States* and *Humphrey's Administratrix* v. *The United States*, are adverse to claims for interest upon Florida adjudications or disturbing decisions of the Commissioners, under the Treaty of 1819 with Spain. The liability of the United States to suit or judgment comes in question in *Reeside's Executrix* v. *The United States*. And the revenue cases, in which *Sturges, Bennett & Co.*, and *Beatty's Executor* are petitioners, discuss and decide points of the greatest interest to importers all over the Union, namely: (1) that the act of Feb. 26, 1845, is not applicable to cases of unascertained duties; (2) that the want of a protest does not bar a party's claim against the United States for overpaid duties; and (3) that a party who, on the redelivery to him of warehoused goods, pays without protest duties not imposed by law, but which are exacted by the collector, is entitled to relief against the United States to recover back such duties. It is much regretted that its length does not permit the insertion of the very able and interesting opinion in *Owners of the Brig Armstrong* v. *The United States*.

J. C. D.

COURT OF CLAIMS.

SAMUEL P. TODD
v.
THE UNITED STATES. } OPINION.

GILCHRIST, P. J., *delivered the Opinion of the Court.*

The claimant's allegations are that, being a purser in the navy, and serving in the United States Delaware flotilla, he received, in his official capacity, from the Government, between the years 1812 and 1815, certain sums of money, to be used in paying persons employed in the naval service, in treasury notes. A part of these notes was sold by him at a discount, under the authority of his commanding officers, for the purpose of paying off seamen and others. The discount amounted to the sum of $574 50, which he has charged in his accounts and furnished vouchers therefor, which are on file in the office of the Fourth Auditor. The reason given by the accounting officers for declining to put this sum to his credit is, that no authority has ever been given them, except by special acts in particular instances, to credit any disbursing officer with his loss upon such notes.

In answer to a call upon the Treasury Department for information relating to this claim, we have been furnished with a copy of a letter addressed to the Secretary of the Treasury, dated on the 27th day of January, 1855, and written in answer to a letter of the Hon. R. M. T. Hunter, of the Senate, addressed to the department. The letter to which we refer was written by Mr. Dayton, the Fourth Auditor, and in it he states as follows: "Mr. Todd, during the last war with Great Britain, was purser of the Philadelphia station, and had charge of the accounts of the officers and men of the Delaware flotilla of gun-boats. In the year 1817 he rendered an account, in which he charged the sum of $574 for loss sustained by him on the sale of treasury notes, which were then at a discount in the market, and which he was compelled to exchange for smaller money to enable him to pay the men. This claim was disallowed; but upon what grounds I have not the means

of positively ascertaining. It has since been frequently renewed, however, and it would appear, from the correspondence of the office, that it was rejected from time to time, owing to the want of proper proof of the loss, and want of legal authority to make such an allowance. In the year 1839 the deficiency in the evidence was supplied as to a part of the claim, amounting to $313, by the production of the approval of the commandant of the flotilla. The receipts of brokers were produced for a portion of the remainder, showing that, in December, 1814, they had sold treasury notes for Purser Todd to the amount of $4,000, on which there was a discount of $240; but these vouchers were not approved by Commodore Rodgers, the commandant of the station. On one of the rolls, however, approved by the commodore, the following note is indorsed by the purser: "The men whose names are herein mentioned were all paid off in Philadelphia bank-notes, treasury notes having been negotiated for that purpose by direction of Commodore Rodgers." The amount paid to the men alluded to was $2,630 31, and as the approval of Commodore Rodgers is directly under the note, and as the roll is dated on the 31st of December, 1814, during which month the notes were sold, I presume that the approval may be considered of the same force, to the extent of $2,630 31, as if it had been attached to the brokers' bills. The average discount on treasury notes during that month appears to have been six per cent. Purser Todd, in one of his letters to this office, complained that he was not informed of the necessity of Commodore Rodgers' approval of the vouchers until some years after the first account was rendered, and that, owing to the commodore's loss of memory, it could not then be obtained. It was the duty of the memorialist, however, being a purser in the navy, to be acquainted with the rules of the department, and to present his evidence, in the first instance, in the requisite form. Upon the statement of his accounts in 1849, a balance of several thousand dollars was found to be due from him to the United States, including the sum of $574, now in question, the whole of which balance he paid into the treasury, by order of the Secretary of the Navy.

"I think he has proved his loss on the negotiation of treasury notes, under the circumstances mentioned in his petition, to the amount of $470, or thereabouts."

From another letter, dated on the 4th of December, 1855, written by Mr. Dayton to the Secretary of the Treasury, it

appears that the sum of $574 was paid into the treasury on the 11th of November, 1839.

By this statement of the Fourth Auditor it appears that, in the first place, the claimant satisfactorily proved a loss by the depreciation of treasury notes, amounting to the sum of $313. He then showed, by the bills of brokers, a depreciation of six per cent. upon the sum of $2,630 31, amounting to the sum of $157 82, making in the whole the sum of $470 82, which agrees with the loss as estimated at the treasury. This sum of $2,630 31 is a part of the sum of $4,000 which was sold in the month of December, 1814. The claimant alleges that he is entitled to be allowed six per cent. on this sum, but he is allowed six per cent. on the sum only of $2,630 31. The difference between the sum claimed and the sum allowed is $82 18, and in the present stage of the case it is upon this sum only that any question arises, for, upon the vouchers showing a loss to this extent, the approval of the commodore was not produced.

The objection is, not that the notes, amounting to $4,000, were improperly sold, but that the proof adduced does not comply with the rules of the department so far as regards the sum of $82 18.

We start, however, with the fact, that in the month of December, 1814, the average depreciation on treasury notes was six per cent. The sum of $4,000, then received from the Government in treasury notes, would pay the debts of the Government only to the extent of $3,760. If, then, the purser had shown that he paid the officers and men the sum of $4,000, there would be competent evidence tending to prove that the United States were indebted to him in the sum of $240, over and above the money he had received; and, in the absence of evidence to the contrary, a jury would be authorized to come to that conclusion. But it is unnecessary to rely on this view of the case, for the statement of the department is that the receipts of brokers were produced, showing that in December, 1814, they had sold treasury notes for Purser Todd to the amount of $4,000, on which there was a discount of $240. The question now is, not whether the amount of the depreciation should have been allowed at the treasury, but whether it should now be allowed by the United States. It is entirely proper that, for the methodical conduct of business at the treasury, rules should be established which the experience of its officers informs them are best adapted for

that purpose. But such rules cannot, in a suit against the United States, supersede the ordinary principles and requirements of the law of evidence, nor can they add anything to what the law requires of a claimant in order to make out his case. The treasury notes having been sold by the brokers, their accounts of such sales, duly proved, are competent evidence, and the best evidence the nature of the case admits of to prove the extent of the depreciation. It was the duty of the purser to pay off the officers and men of the flotilla, so far as the funds furnished him by the Government would permit. But the notes were worth less than their nominal value by six per cent., and, to the extent of six per cent. on the amount, the purser may be considered as having paid his own money. Before his accounts were stated, on the 11th of November, 1839, the facts in this case would be sufficient to support an action for money paid, and after that date, and after he had paid the money into the treasury, the facts would support an action for money had and received. The approval of the commodore upon the vouchers is to be regarded only as required by a rule of convenience at the treasury, but it cannot be considered in a court of law as a rule of evidence. Cases might undoubtedly occur, where, under peculiar circumstances, a wanton disregard of the rules of the department might be indicative of fraud, or of such gross negligence in the claimant as might authorize the rejection of his claim; but nothing of the kind appears here. The fact that the purser was not informed of the necessity of the commodore's approval of the vouchers until some years after 1817, when the claim was made, can scarcely be considered gross negligence. If an officer's accounts be substantially correct, he can hardly be subjected to such a charge, because he is ignorant of merely formal proof not required by an act of Congress.

We shall, therefore, report a bill in favor of paying to the claimant the sum of $553, for which he has produced satisfactory evidence.

It is contended, on behalf of the claimant, that the United States should be charged with, and should pay, interest on the amount of the claim. If this be so, it is either because the court should report to Congress that, in their judgment, the claimant is fairly and equitably entitled to interest, or because that they should report that the United States are legally bound to pay interest on the amount ascertained to be due,

upon the principle that, in the ordinary courts of law, enables a creditor to recover interest of his debtor.

In regard to the first of these reasons, it is proper to inquire into the principle that should govern the court in their adjudications upon the cases within their jurisdiction, either as belonging to one of the classes specified in the act, or as referred to the court by one of the houses of Congress. If a claim be alleged to be "founded upon any law of Congress," in the words of the act we must construe such law, and ascertain its meaning by applying to it those rules of construction which a wide and long-continued experience has determined to be the best adapted to that purpose; and the same course must be pursued where a claim is founded "upon any regulation of an exective department." If a contract with the Government of the United States be the foundation of the claim, the nature and validity of such a contract must be determined by the application of known and well-settled principles of law. Without such principles to guide them, no tribunal, no body of men, judicial or deliberative, can administer any other than that hasty and impulsive justice, whose decisions, as they would be uncontrolled by any rule, could never aid the citizen in ascertaining the extent and nature of his rights.

If the application of principles of law, considering the law as our rule of conduct, be necessary in the cases belonging to the classes specified in the act, it is equally so in regard to the claims referred to the court by either house of Congress. It seems sometimes to have been supposed that the language of the act on this point was comprehensive enough to authorize the court to recommend Congress to do anything it may be in their power to do—in fact, to pass any law that would not be a violation of the Constitution. But our duties are not advisory. The language of the act does not authorize us to regard this tribunal as possessing any other qualities than those which properly belong to a court. A committee may recommend, but a court can only adjudge, and that whether its jurisdiction be final or not. It cannot adjudge without founding its judgments upon the law, and, where it can find no law, it can render no judgment. It may, perhaps, be said that as our judgments are not final, and as we must report to Congress, our decisions can be regarded only as recommendatory in their nature. But the seventh section of the act provides that the court "shall report to Congress the cases upon which they shall have finally acted, stating in each the material facts

which they find established by the evidence, with their opinion in the case, and the reasons upon which such opinion is founded." Under this provision an "opinion in the case" can mean only an opinion as to the rights of the parties upon the facts proved or admitted in the case. We do not think that Congress, by establishing this court, intended to constitute a council to advise them what course it would be honest and right, or expedient, for them to pursue in any given case. They meant, as the title of the act denotes, "to establish a court for the investigation of claims," to ascertain the facts in each case, and the legal rights and liabilities arising from those facts. It is only by acting upon some settled plan, and according to some fixed principles, that the duties of the court can be performed with any prospect of administering substantial justice. The obvious duty of the court is to expound the law as they find it established, and apply it to the cases before them, and not to create it: *jus dicere*, and not *jus dare*.

Considerations of this general character are pertinent to the subject before us, because it raises the question at once, how far we should recommend to Congress to do what we might think right and proper to be done, and how far we are bound to confine ourselves to the application of principles of law. It is always within the power of Congress to make a law for each case, within the limits of the Constitution, but, in our opinion, we have no power to make a law for any case. Congress did not intend that we should legislate. In that case we must make the law before we could pronounce a judgment, when the claim did not come within any principle. If Congress think that the law, as it exists, does not render justice to a party, the remedy is in their own hands, by legislating in such a way as the demands of justice may require. It is more consistent with the Constitution, which requires that the departments of the government should be kept distinct from each other, and far better and safer that the power of legislation should be exercised by Congress, than that it should be vested in any judicial tribunal. It is the peculiar duty of Congress to understand the wants of the country, and what is equitably due to the citizen, and, within constitutional limits, to legislate accordingly. But if we were to recommend any action to supply any supposed deficiency in the laws, we should not only assume a responsibility which does not belong to us, but we should interfere with the prerogative of the legislature. We shall, therefore, confine ourselves to determining how far

the United States are bound by law to pay interest upon a sum ascertained to be due.

It has been supposed that, as, when a petition is presented to this court, the United States occupy the position of an ordinary defendant in a suit at law, the claimant, when a sum is adjudged to be due to him, is entitled to recover interest from the United States, as any plaintiff would be who had established his right to recover a certain sum of a defendant. It will illustrate the question to inquire how far this right extends between private persons. Laying aside the right to recover interest founded on the obligation of a contract, a party in a suit at law is entitled to it only upon one of three grounds. The right to recover interest must depend—

1st. Upon statutory provisions.

2d. Upon the authority of adjudged cases; or

3d. Upon some usage known to, and recognized by, the parties.

The first ground is sufficiently intelligible without any further comment.

As to the second ground, the authority of adjudged cases, it is somewhat remarkable that upon a subject of such frequent recurrence, and so necessary to be early settled and understood, the decisions of the courts, both American and English, should be so numerous and so discordant. An analysis of the authorities will show that it is difficult, if not impossible, to elicit from them any general rule regulating the rights and liabilities of parties upon this subject. An elaborate and able investigation of the cases is to be found in the opinions of Savage, C. J., and Sutherland, J., in the case of *Reid* v. *Rensselaer Glass Factory,* 2 Cowen, 387, in the Supreme Court of New York, and in the opinion of Mr. Senator Spencer, in the same case, in the Court of Errors, reported 5 Cow., 587. But it is unnecessary at present to attempt an investigation of them. In the case of *Calton* v. *Bragg,* 15 East., 226, Lord Ellenborough said: "Lord Mansfield sat here for upwards of thirty years, Lord Kenyon for above thirteen years, and I have now sat here for more than nine years (a period of fifty-two years,) and during this long course of time no case has occurred where, upon a mere simple contract of lending without an agreement for the payment of the principal at a certain time, or for interest to run immediately, or under special circumstances from whence a contract for interest was to be inferred, has interest ever been given." This statement

appears to be conclusive as to the law of England at that time, and also to show that the allowance of interest by the court, as an incident to the debt, is always founded upon the agreement of the parties. Lord Chief Justice Abbott says, in *Higgins* v. *Sargent*, 2 B. & C., 348, that, "as a general principle, it is now established that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade, or other circumstances." Mr. Senator Spencer, in 5th Cowen, 608, also says, that "its allowance by the courts as an incident to the debt, and invariably following it, is founded solely upon the agreement of the parties."

In England interest has been refused where property has been unjustly detained, or payment improperly refused, even in cases of fraud, Lord Ellenborough saying, in the case of *Crockford* v. *Winter*, 1 Camp., 129, that the fraud did not take the case out of the rule he had previously laid down in *De Haviland* v. *Bowerbank*, 1 Camp., 50; that there must be an agreement expressed or implied; and this principle was afterwards adhered to in the case of *Bernales* v. *Fuller*, 2 Camp., 426. By the act of 3 and 4 W., ch. 32, 48, it was provided that upon sums certain, payable at a certain time, or otherwise, the jury *may*, *if they* shall think fit, allow interest to the creditor. This act, however, leaves the matter in great uncertainty, as the jury are to exercise their discretion in each case.

Still there are decisions the effect of which would seem to be that interest in some cases is a legal claim, irrespective of any agreement. Although it has been often stated that interest is not recoverable for money owing for goods sold and delivered, as in *Blaney* v. *Hendrick*, 3 Wils., 205, and in *Eddowes* v. *Hopkins*, Dougl., 376, still it is said by Lord Thurlow, in *Boddam* v. *Reily*, 2 Bro. C. C., 3, that "all contracts to pay undoubtedly give a right to interest from the time when the principal ought to be paid." One reason for the discrepancy in the decisions is to be found in the neglect to discriminate between the cases where interest has been held to be an incident to the debt, and those cases where it has been held that the jury might allow it by way of damages for the detention of the debt. In *Eddowes* v. *Hopkins*, Dougl., 376, Lord Mansfield held, that though, by the common law, book debts do not, of course, carry interest, yet, in cases of

long delay, under vexatious and oppressive circumstances, it may be allowed, if a jury, in their discretion, shall see fit to allow it. In *Entwistle* v. *Shepherd*, 2 T. R., 28, which was debt upon a judgment, Buller, J., said, it was a question for the jury whether they would give interest by way of damages. In *Bunn* v. *Dalzell*, 2 C. and P., 376, it was held by Lord Tenterden, that whether interest should be recovered upon an Irish judgment was a question for the jury; and if they thought the plaintiff had been diligent, and had taken proper steps to find his debtor, they might allow it. In *Craven* v. *Tickell*, 1 Ves. jr., the Lord Chancellor said, "from conversation I have had with the judges, interest is given either by the contract, or in damages upon every debt detained." But in *Gilpin* v. *Consequa*, Pet. C. C. R., 85, Washington, J., said "It is not agreeable to legal principles to allow interest on unliquidated or contested claims in damages;" and in the subsequent case of *Willing* v. *Consequa*, ibid. 172, the same judge said: "Interest is a question generally in the discretion of a jury."

It has not been our purpose, in referring to some of the more prominent decisions on this subject, to ascertain whether any general rule can be deduced from them that shall regulate the allowance of interest in suits at law, as that is not the question before us. Our object has been simply to show that the authorities are conflicting, and that an approximation to a rule is to be found in those decisions which hold that, in the absence of a contract to pay interest, it may in some cases be allowed by the jury, upon a view of all the circumstances in the case. But even supposing that juries are vested with a discretion to allow interest or not, we do not occupy the position of a jury, although, to a certain extent, we necessarily exercise some of the functions belonging to that body. Like a jury, we are called upon to determine questions of fact; but of that wide discretion which, according to some of the cases, juries may often exercise, we possess no portion. On this subject, they derive their power, so far as it may exist, from practice sanctioned by judicial decisions. In regard to the questions before us, there have been no judicial decisions and no practice. Our duty is confined to determining whether certain facts are proved by the evidence, and only in this respect are our duties like those of a jury. If we were to take Lord Mansfield's rule, that a jury, in their discretion, might allow interest "in cases of long delay, under vexatious and

oppressive circumstances," and apply it to claims against the United States, the question would then be whether, in the given case, the United States have been dilatory, and had postponed the payment of the debt for an unreasonable period. This would render it necessary to inquire, to some extent, into the condition of the United States when the debt accrued and since; the situation of their foreign and domestic relations, the position of their financial affairs, the existence of financial crises, and everything that would throw any light upon the question, whether it was or was not, on the whole, unreasonable that payment of a debt should have been delayed. Such a vague and unlimited discretion we should hesitate to exercise without an authority vested in us in clear and positive terms.

In regard to the third source of the right to recover interest in suits at law, the existence of a usage known to and recognized by the parties, it is sufficient for our present purpose to say, that the usage of trade in this, as well as in other cases, may properly, and often does, regulate the contracts of parties. (*Meech* v. *Smith*, 7 Wend. 315.) A usage may operate upon and modify the rights and duties of individuals whose dealings are comprehended within it, whether it be local merely, or the usage of a particular trade. As they are presumed to contract with reference to the usage, it thus becomes a part of their contracts.

If we attempt to apply to cases in this court, where claims are preferred against the United States, the rules which regulate the liability of parties in ordinary suits, we shall find that the liability of the United States to pay interest upon a debt, cannot be traced to any of the sources from which the liability of individuals can be deduced. There are, in the first place, no acts of Congress which impose this liability upon the United States. Statutes may be found exceptional in their character, and based upon peculiar circumstances, which induced Congress, in the exercise of their discretion, and in view of what seemed to them proper, to provide that interest in certain cases should be paid. But there is no general law enacting that interest shall be paid on debts due from the United States, nor has any general appropriation of money ever been made for the purpose of paying claims for interest.

Secondly. There are no adjudged cases which might serve to us as precedents for deciding that the United States are legally bound to pay interest. Indeed, until the institution

of this court, there was no mode by which the liability of the United States, upon this point, could be made the subject of judicial investigation. But we are not aware that there are any cases in which the question has been even incidentally discussed. There is no law enacting that interest shall not be paid, as there is no law protecting the United States from being sued; but we presume that it was never supposed such a suit would lie until the passage of the act constituting this court. We could not, then, justify ourselves for holding that the United States are liable to pay interest by appealing to the decisions of tribunals where this question has arisen and has been decided.

There is a remark made by Mr. Justice Baldwin, in pronouncing the judgment of the court in the case of *The United States* v. *Arredondo*, (6 Pet. 711,) which might at first be supposed to have some bearing upon this question. He says: "The only question depending is, whether the claimant or the United States are the owners of the land in question. By consenting to be sued, and submitting the decision to judicial action, they have considered it as purely a judicial question, which we are now bound to decide as between man and man on the same subject-matter, and the rules which Congress themselves have prescribed." We do not understand this remark as meaning anything more than that when the United States have permitted themselves to be sued they became subject to such rules and principles of law as may be applicable to them, or may have been prescribed by Congress. The case referred to was decided more than twenty years before the United States were made suable, and when it was necessary to state a rule for the decision of that particular case alone, the court not being called upon to state any general principle regulating their liabilities in all cases. We have no reason for supposing that Congress by constituting this court, intended to provide that all the acts of Congress, and all the judicial decisions, and all the principles which regulate dealings between man and man, were to be applied at once and without discrimination to the United States; that they might, for instance, plead the statute of limitations without any express authority, or be subject to other laws enacted before they could be made parties to suits, and whose application to them could not have been anticipated. By the institution of this court, a new party defendant has been called into existence, and made to appear before it, with duties to the claim-

ants not at present distinctly defined, and requiring the light of research and reflection to display their outlines. If Mr. Justice Baldwin could have supposed that he was stating a rule of conduct for the United States in all cases where, by subsequent legislation, they might be made defendants, the subject would undoubtedly have been examined with a degree of care commensurate with its importance.

Thirdly. The liability of the United States to pay interest cannot be founded on such a usage as enters into, and forms a part of, the contracts of individuals. The usage is directly and expressly the reverse. The Government has not only omitted to pay interest, but, for the greater part of a century, it has expressly refused to pay it. The practice of the Government on this subject, is fully stated in a recent opinion of the present Attorney-General, Mr. Cushing, under the date of September 20, 1855. It there appears that as long ago as the year 1819, Mr. Wirt spoke of a refusal to allow interest as "the usual practice of the Treasury Department;" and this practice has existed to the present time, unless when it has been dispensed with by some special law.

Nor can it be said that the United States are bound to pay interest on the ground that their liability is to be classed with the duties of imperfect obligation mentioned by writers on ethical jurisprudence, and that to receive interest is a right for which no remedy has been provided. It would be going very far to say, that interest is due as an abstract right, founded on moral principle. It is well known to be discountenanced and forbidden in some parts of the world, and by some religions. (*Lowe* v. *Waller,* Dougl., 736, 740.) It is wholly conventional in its origin, arising out of an artificial state of society, in which new rules of action grow up in proportion as social relations become more intricate, and require a nicer discrimination. As it depends upon law and usage, where they are not found it cannot be said to exist.

In the discussion of this subject we have endeavored to confine ourselves to the question, whether there is any law or any usage that would authorize us to decide that the United States are bound to pay interest in any case where a debt is ascertained to be due to a claimant? For the present purpose it is unnecessary to consider the question, how far the United States may be bound to pay interest under the name of "damage," or "injuries," or "indemnity," or "satisfaction," or "redress," or corresponding words in treaty stipula-

tions. It is the question in the present case that we intend to determine, and nothing more. Upon other matters, not now before us, it would be premature to express an opinion.

Nor, as has before been intimated, do we feel ourselves called upon to say how far it would be just and equitable for the United States to pay interest by analogy to the laws and usages which regulate pecuniary dealings between individuals. If Congress, to whom the enactment of laws belongs, think it proper to provide that the United States shall pay interest on sums due from them, and to appropriate money for that purpose, it is an easy matter for them to carry that opinion into effect, and to pass such laws as they may deem expedient. But we have a sufficiently responsible duty to perform in applying to the cases before us such principles of law and equity as we find established, without assuming upon ourselves the further duty of recommending to Congress the passage of laws to supply any such deficiencies as may be supposed to exist.

We are aware that in the numerous and extensive pecuniary dealings between the citizens of the United States and their government, cases must arise where, according to the usual understanding among individuals, a refusal by the United States to pay interest would be regarded as wholly unjustifiable. But such legislation as a regard to the national faith may require, is the peculiar duty of Congress. If we were to report to Congress that a claimant should receive interest, in the absence of an agreement to that effect, it must be because he is legally entitled to it, or because we have that general discretion possessed, according to some of the cases, by a jury. We do not think that, as regards the United States, either of these propositions is correct. We shall, therefore, report only a bill in favor of paying to the claimant the sum due him, without interest, to which interest may be added if Congress should see fit to allow it; or Congress can pass a general law on the subject, with such modifications and limitations as they may deem expedient.

COURT OF CLAIMS.

THOMAS H. BAIRD,
v.
THE UNITED STATES.
} OPINION.

GILCHRIST, P. J., *delivered the Opinion of the Court.*

The petitioner alleges that his father, Dr. Absalom Baird, was a commissioned surgeon in the army of the Revolution, and in that capacity was entitled by law to half-pay for life, and other emoluments.

Whether this allegation be true, is the first inquiry in the case.

It is not denied that he was surgeon of a regiment of artificers, and was discharged from the service, upon the reduction of his regiment, on the 29th of March, 1781.

Whether this corps constituted a part of the army, so as to entitle the surgeon, upon its reduction, to half-pay for life, is a point to be determined by an examination into the manner in which it was considered by the legislative authority at the time, and into the language of the resolution upon the subject.

The resolution of September 30, 1780, provides for "the pay and establishment of the officers of the hospital department and medical staff," and specifies the pay of the director, chief physicians, and surgeons of the army and hospitals, purveyor and apothecary, physicians and surgeons of the hospitals, assistant purveyors and apothecaries, regimental surgeons, surgeon's mates in the hospitals, surgeon's mates in the army, and steward and wardmaster for each hospital. As Dr. Baird rendered medical services to the United States, and in their employ, in a position, at least, connected with the army, and as this was the only provision for the payment for medical services, and as he was entitled to compensation, he would seem to be necessarily included in the class of "regi-

mental surgeons," particularly if there be anything to corroborate this view of the case.

We think it cannot be denied that Dr. Baird was an "officer," and the resolution of the 21st of October, 1780, provides that the "officers reduced" shall be entitled to "half-pay for life." This resolution had regard to the reform of the army which was to take place on the 1st January, 1781. Subsequent to this date, on the 17th of January, a resolution was passed, the preamble to which is as follows: "Whereas, by the plan for conducting the hospital department, passed in Congress the 30th day of September last, no proper establishment is provided for the *officers of the medical staff*, after their dismission from public service, which, considering the customs of other nations, and the late provision made for the officers of the army, after the conclusion of the war, they appear to have a just claim to; for remedy whereof, and for amending several parts of the above mentioned plan," it was provided that all officers in the hospital department and medical staff, hereinafter mentioned, who shall continue in service to the end of the war, or be reduced before that time as supernumeraries, shall be entitled to receive during life, in lieu of half-pay, the following allowance, &c. It was then provided that "regimental surgeons" should receive an allowance equal to the half-pay of a captain. It is not at all probable that Congress intended to exclude from the benefit of this resolution the surgeon of the corps of artificers. Still, in order to entitle Dr. Baird to half-pay for life, he must be brought fairly within the class of regimental surgeons by reason of his connexion with this corps. On the 12th of November, 1779, Congress resolved "that the eleven companies of artificers raised by the quartermaster-general, be reformed and incorporated and arranged in such a manner as the commander-in-chief shall deem proper." On the 3d of October, 1780, a resolution was passed providing for the reduction of certain regiments on the 1st day of January then next, and that after that day the regular army of the United States should consist of "4 regiments of cavalry or light dragoons, 4 regiments of artillery, 49 regiments of infantry, and 1 regiment of artificers," and that the regiment of artificers should consist of eight companies, and each company of 60 non-commissioned officers and privates.

These resolutions appear to us to be entirely conclusive. We do not see how any doubt can remain on the subject.

This body of artificers is called a regiment, and is declared to be a part of the regular army. The surgeon of it, therefore, is a regimental surgeon, and if anything more be necessary in order to constitute him such, we are at a loss to understand what it can be.

If these views be correct, as we think they are, when the regiment was reduced on the 29th of March, 1781, the surgeon of the regiment had a right to half-pay for life, which no subsequent legislation by Congress could, upon any principle of justice or legal reasoning, take away from him. It was a right earned by meritorious services, and conferred upon him in consideratiou of the sacrifice of his time and his talents for the good of the cause which all had at heart. To say that any subsequent declaratory legislation by Congress, as to the character of this corps, could deprive Dr. Baird of his half-pay to which he was entitled, would be to declare, not only that the precedents which a sense of justice had established in regard to the binding force of contracts might properly be disregarded—not only to maintain that the opinion and interests of one party to a contract might be substituted for the assent of both—but to assert, that notwithstanding all that had been said and done, there was no contract between Dr. Baird and Congress.

But we think that an analysis of the action that has been had upon this subject will show that there has not even been any declaratory law or resolution by Congress, which tends to the conclusion that Dr. Baird was not entitled to half-pay.

On the 19th of March, 1790, General Knox, the Secretary at War, reported a resolution to Congress "that the petition of the late officers of the artillery artificers for the commutation of the half-pay cannot be granted, the United States in Congress assembled having decided against the same on the 19th of October, 1785." He says, that the principles on which the decision was founded, will appear by the reports of the late commissioner of army accounts, and a committee of Congress, which he submits.

The report of the commissioner was in consequence of the petitions of John Jordan and Thomas Willey, late captains in the Pennsylvania corps of artillery artificers, for a commutation in lieu of half-pay for life. The substance of the report is, that Congress confined the promise of half-pay to *military* officers only, and that the officers of artificers were not military officers.

It may be remarked of this report, that it does not even by implication controvert Dr. Baird's claim, because it was made in relation to a class of officers to which confessedly he did not belong. No one ever supposed that a surgeon either in the army or the navy was in the strict sense of the word a military officer; and it is not upon that ground that the present claim rests. The duty of a surgeon is to attend upon the sick and wounded, to employ his skill as well upon those who are enfeebled by disease, as upon those who are wounded in battle. The surgeon is no more a military officer when attached to an infantry regiment, than when on duty in the regiment of artificers, and he is as much a military officer in the latter case, as when he is on duty at a garrison, or on a recruiting station. We are aware of no reason why Dr. Baird might not properly have been ordered upon any duty which any regimental surgeon might have been required to perform.

The report of the committee of Congress, to which General Knox refers, denies the claims of Captains Jordan and Willey upon the same ground, that they were not military officers, and the same remarks are applicable to it.

General Knox also refers to a former report of his, dated on the 30th of July, 1788, in which he states, that the artificers were a part of the civil branch of the Ordnance Department; and also, that when the officers of this corps were commissioned as officers of "artillery and artificers," the manner of filling up the commissions must have been an error, as it was not authorized by any act of Congress. It is true, that there may have been no act of Congress pointing out the manner in which the commissions should be filled up; but it is not so clear that the mode in which they were filled up was unauthorized. His report states, that "the artificers did not in any instance act in the field as artillerists;" but it states, also, that "they were mostly stationed at the arsenal at Carlisle, and employed in making carriages of various kinds for the use of the artillery in the field." It is not then a forced construction of their position which induced them to regard themselves as officers of "artillery and artificers," although whether they were properly so regarded or not has no bearing on the present case, as we shall hereafter have occasion to remark.

We are not called upon to decide whether Captains Jordan and Willey were or were not "military officers" in a sense

which would entitle them to a commutation of half-pay. Whatever the decision might be, it could not have the slightest effect upon the question whether Dr. Baird was or was not a commissioned surgeon in the army of the Revolution. It may, however, be remarked, that as the resolution of October 3, 1780, provided that the regular army of the United States should consist of certain regiments of cavalry, artillery, infantry, and "one regiment of artificers," it is extremely difficult to understand how anything like logical reasoning can lead to the conclusion that the officers of this regiment, forming a part of the regular army, were not military officers, so as to entitle them to commutation. The "contemporaneous construction" on which stress was laid in the argument, and which led the committee to decide that they were not military officers, is entitled to just so much weight as its intrinsic merits deserve, and no more. Mankind are as competent now to judge of the meaning of words, as they were then; and the executive and military departments of that day did not assume to possess any superior knowledge. There is no more mystery in the acts of Congress passed seventy years ago, than in those of the present day; nor is any greater skill required to construe them. But at any rate the case of Captains Jordan and Willey has no bearing whatever on the case of Dr. Baird. Their case may be used as an *excuse*, but certainly affords no *reason* for omitting to pay this claim.

For these reasons we are of opinion that Dr. Baird was entitled to half-pay for life, from the time of the reduction of his regiment on the 29th of March, 1781.

The next question in the case is, whether the claimant is entitled to interest.

On the 3d of June, 1784, Congress passed the following resolution:

"That an interest of six per cent. per annum shall be allowed to all creditors of the United States for supplies furnished or services done from the time that the payment became due." No language could be more express or free from doubt than this. It is directly applicable to the present case. Dr. Baird had rendered services to the United States, for which he was entitled to half-pay for life. His half-pay became due at the expiration of a year from the time of his reduction, and at the end of each successive year thereafter. The resolution was passed from a feeling that it was just and right that interest should be paid from the time the half-pay became due,

and it was a voluntary contract on the part of the United States constituting a legal claim against them which no subsequent legislation could release without the assent of the other party. It may be added, that up to the year 1837, there was paid interest on 1,510 claims of widows and orphans, and claims of officers for personal services, the statutes of limitation as to such claims having been suspended.

The proceedings in relation to the claim for commutation do not appear to be very material in relation to the case in its present position. On the 23d of March, 1783, a resolution was passed providing that the officers and others, entitled to half-pay for life, "shall be entitled to receive at the end of the war their five years' full pay, in lieu of half-pay for life, in money, that is, specie, or in securities on interest, as Congress should find most convenient." On the 28th of January, 1794, Dr. Baird applied for the benefit of this provision, but died in the year 1805, having, as is said in the report of the Committee of Claims of the 5th of February, 1855, "become wearied and disheartened with delay." In the year 1818, his son, Thomas H. Baird, having become of age, petitioned Congress for relief, and on the 3d of March, 1835, the committee reported that "Dr. Absalom Baird was entitled to the benefit of the provision of the resolution of the 17th of January, 1781, extending the grant of half-pay for life to the officers of the hospital department and medical staff." No action was had upon the resolution until the 22d of June, 1836, when an act was passed granting five years' full pay as commutation, under the resolution of 1783, but without interest.

Now this claim does not depend for its validity upon any admission contained in the act of 1836. But the Congress which passed that act must have considered that Dr. Baird had a legal claim of some kind, otherwise their conduct in granting him five years' full pay was wholly indefensible. It is, however, relied upon as a final settlement of the claim. Upon any principle known to the law, this position is wholly untenable. It is easy enough to declare, *ex cathedra*, that it was a final settlement. But it is extremely difficult to imagine, in the absence of all evidence, what reasons can be urged for holding that the payment of a sum of money is of itself a discharge of a debt for a larger amount. A plea of payment of a small sum in satisfaction of a larger, is bad even after verdict. 2 Parsons on Contracts, 130, and notes. This principle is familiar to every lawyer. A debt may be paid by a

fair and well understood compromise carried faithfully into effect. But here there was no compromise. If it were a case between individuals no one would dream of applying such a term to it. The United States are either bound by principles of law applicable to them, or they are not so bound. If they are not bound, there is an end of the discussion, for then all reasoning is fruitless. If they are bound by the principles of law, it is impossible to regard the payment of five years' full pay without interest as a satisfaction of this claim. There is no evidence that either party so regarded it, and unless we set at defiance every principle of law, we cannot hold that one party to a contract, without the assent of the other, can discharge his debt by the payment of a smaller sum than the amount due.

If A owes B a thousand dollars by his promissory note, payable in ten years, with interest, and if, when the note becomes due, A pays five hundred dollars on the note, but refuses to pay the remainder and the interest, upon the principle here contended for, the payment of five hundred dollars discharges the debt. Such a proposition, to be refuted, needs only to be stated.

If Dr. Baird was entitled to commutation under this resolution, he should have received either the money or securities, as Congress should find most convenient. They did not find it convenient to pay the money at the time, and of course he was entitled to interest. He asked either for the money or securities on interest, but Congress permitted fifty-three years to elapse after the passage of the resolution, and then gave him merely the sum of $2,400, to which he was entitled in the year 1783. Mr. Ready's report of the 5th of February, 1855, considers only the question whether interest should be allowed on the five years' full pay as commutation from the end of the war, the time when it became due, and the committee decide that interest was due. But as our opinion is that Dr. Baird was entitled to half-pay for life, from the 29th of March, 1781, the matter relating to the commutation need not be further inquired into.

The evidence in the case proves, that Dr. Baird was surgeon of the regiment of artificers from the 20th of March, 1780, and served in that capacity until the regiment was reduced on the 29th of March, 1781. It is admitted by the solicitor, and the evidence proves, that the case does not come within any of the acts or resolutions in the nature of acts of limitation,

which required claims to be presented within a specified period, and is not barred by any of them. It is admitted that Dr. Baird died on the 27th of October, 1805; and it is proved that the claimant, Thomas H. Baird, was appointed administrator of his estate on the 9th day of March, 1809.

The amount of Dr. Baird's half-pay was $240 per annum, payable at the end of every year. He was entitled to this sum up to the 27th of October, 1805, the day of his death, and interest on the payments as they became due, according to the express provisions of the resolution of June 3, 1784. There was, therefore, due him at the time of his death the sum of $10,074 84; upon this sum interest is due from the 27th of October, 1805, until the 1st of June, 1856, deducting therefrom the sum of $2,400, paid under the act of 1836, and we report a bill accordingly.

A BILL* FOR THE RELIEF OF THOMAS H. BAIRD.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, directed, out of any money in the treasury not otherwise appropriated, to pay to Thomas H. Baird, administrator of the estate of Absalom Baird, a commissioned surgeon in the army of the Revolution, the sum of ten thousand and seventy-four dollars and eighty-four cents, with interest thereon from the 27th day of October, 1805, to the 1st day of June, 1856, deducting therefrom the sum of twenty-four hundred dollars, paid under the act of June 23, 1836.

* This Bill, as presented by the Court, was reported, and passed both Houses by large majorities, and without amendment. The act was duly approved, and the amount has been paid at the Treasury.

COURT OF CLAIMS.

ROBERT ROBERTS
v.
THE UNITED STATES.
} OPINION.

BLACKFORD, J., *delivered the Opinion of the Court.*

The petition, in this case, relies on an alleged illegal seizure by Spain or France, in 1805, of the brig "Experiment" and on treaties between those nations and the United States.

We shall first examine the case on the petitioner's complaint, that the seizure was by a Spanish vessel.

The United States, by the 9th article of the treaty of 1819 with Spain, renounced all such claims against Spain as the one now before us.

The 11th article of that treaty contains the following provision: "The United States, exonerating Spain from all demands in future, on account of the claims of their citizens to which the renunciations herein contained extend, and considering them entirely cancelled, undertake to make satisfaction for the same, to an amount not exceeding five millions of dollars. To ascertain the full amount and validity of those claims, a commission, to consist of three commissioners, citizens of the United States, shall be appointed by the President, by and with the advice and consent of the Senate, which commission shall meet at the city of Washington, and within the space of three years from the time of their first meeting, shall receive, examine, and decide upon the amount and validity of all the claims included within the descriptions above mentioned. The said commissioners shall take an oath or affirmation, to be entered on the record of their proceedings, for the faithful and diligent discharge of their duties; and in case of the death, sickness, or necessary absence of any such commissioner, his place may be supplied by the appointment as aforesaid, or by the President of the

United States, during the recess of the Senate, of another commissioner in his stead. The said commissioners shall be authorized to hear and examine, on oath, every question relative to the said claims, and to receive all suitable authentic testimony concerning the same. And the Spanish government shall furnish all such documents and elucidations as may be in their possession, for the adjustment of the said claims, according to the principles of justice, the laws of nations, and the stipulations of the treaty between the two parties of 27th October, 1795. The said documents to be specified, when demanded, at the instance of the said commissioners."

The commissioners thus provided for by the treaty were afterwards appointed, and the board was organized at the city of Washington, in June, 1821. The statement of the petition, relative to the action of said board on the claim we are considering, is as follows: "And your petitioner further shows, that he presented his claim before the commissioners appointed under the act of Congress of March, 3, 1821, to carry into effect the treaty with Spain concluded the 22d February, 1819, but the claim was disallowed, on the ground that the privateer was French and not Spanish, it having been so decided by the British Court of Admiralty when the vessel was condemned."

We understand, from this language of the petition, that said decision of the commissioners was against the claim upon the merits. To sustain the claim, it was necessary to show, among other things, that the seizure was by a Spanish vessel. The petition says that the claim was disallowed on the ground that the privateer was French and not Spanish. That was surely a disallowance on the merits, because it was a disallowance on the ground that a fact, material to the establishment of the claim, was not proved.

The only other question in this part of the case necessarry to be decided is, whether or not the said decision of the board of commissioners is a bar to so much of the petition as alleges the seizure to have been by a Spanish vessel?

We have recently had a question to decide very similar to the one now before us; and the following observations made on that occasion are applicable to this case: "The final decision of the board against the claim was rendered by a tribunal specially provided for by the treaty for the adjudication of such claims; to which tribunal the original claimant had submitted the case for decision; and from which decision

there is no appeal given to any other tribunal. The judgment of the board stands upon the same ground with the judgment of any judicial tribunal of exclusive jurisdiction."

"The nature and effect of a judgment of this same board of commissioners, under the same treaty of 1819 with Spain, have been examined and settled by the Supreme Court of the United States. Judge Story, in delivering the opinion of the court, uses the following language: 'The object of the treaty was to invest the commissioners with full power and authority to receive, examine, and decide upon the amount and validity of the asserted claims upon Spain for damages and injuries. Their decision, within the scope of this authority, is conclusive and final. If they pronounce the claim valid or invalid—if they ascertain the amount, their award in the premises is not re-examinable. The parties must abide by it as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review in any judicial tribunal; an amount once fixed is a final ascertainment of the damages or injury. This is the obvious purport of the language of the treaty.'—(*Comegys* v. *Vasse*, 1 Peters' Rep. 193, 212; *Thomas and others* v. *The United States*, decided by this court.)" These decisions are precisely in point, and show that the question we have just been considering must be determined against the claimant.

We are next to examine the case on the petitioner's complaint, that the seizure was by a French vessel. The first article of the convention between the United States and France of the 4th of July, 1831, is as follows: "The French government, in order to liberate itself completely from all the reclamations preferred against it by citizens of the United States for unlawful seizures, captures, sequestrations, confiscations, or destructions of their vessels, cargoes, or other property, engages to pay a sum of twenty-five millions of francs to the Government of the United States, who shall distribute it among those entitled, in the manner and according to the rules which it shall determine."—(8 Stat. at Large, 430.)

On the 13th of July, 1832, an act of Congress was passed to carry into effect the said convention with France. The first section of that act is in these words: "The President of the United States, by and with the advice and consent of the Senate, shall appoint three commissioners, who shall form a board, whose duty it shall be to receive and examine all claims which may be presented to them under the convention be-

tween the United States and France of the 4th of July, 1831, which are provided for by the said convention, according to the provisions of the same and the principles of justice, equity, and the law of nations. The said board shall have a secretary versed in the English, French, and Spanish languages, and a clerk, both to be appointed by the President, by and with the advice and consent of the Senate; and the commissioners, secretary, and clerk shall, before they enter on the duty of their offices, take oath well and faithfully to perform the duties thereof."—(4 Stat. at Large, 574.)

The commissioners provided for by said act of 1831 were accordingly appointed, and the board was afterwards organized as the act required.

The petition contains the following statement: "Your petitioner brought said claim before the board of commissioners appointed to carry into effect the treaty concluded with France in 1831, but said board refused to entertain said claim upon the ground that the privateer making said capture was a Spanish and not a French vessel; so that your petitioner, though clearly entitled to indemnification from one or the other of said governments, has been excluded from the provisions made by each for indemnity for illegal captures by an alternate denial of jurisdiction." The petition here shows that the last-named board of commissioners rejected the claim upon the merits. The ground of the rejection was, according to the petition, that the offending vessel was Spanish. Now, the claim before that board being for a French spoliation, could not be sustained without proof that the offending vessel was French; and the decision against the claim for the want of that proof was a decision on the merits.

There is but one other question in this part of the case which need be examined, and that is, Whether or not the decision of the last-named board of commissioners is a bar to so much of the petition as alleges the seizure to have been by a French vessel?

Our answer to this question must be similar to that given in the former part of this opinion to another question. The decision against the petitioner made by the commissioners appointed under the treaty with France, to whom he had submitted the present demand to be examined, is a bar to the claim. The board had exclusive jurisdiction of the case under the act of Congress, and there is no law giving an appeal from the judgment to any other tribunal.

It may be proper to mention that, believing the decisions of said two boards of commissioners on the claim now before us to be a very material part of the case, we applied to the State Department for information on the subject. The answer of the Department is as follows: "The record of the proceedings of the commissioners under the convention with Spain of 1819 has been examined, and it appears that the claim of Jonathan Jenks, growing out of the capture of the brig 'Jane,' was duly presented to the board of commissioners, and was disallowed. The claim of Robert Roberts, growing out of the capture of the brig 'Experiment,' was presented to the same board of commissioners, and was disallowed. The same claim was also presented to the board of commissioners appointed to carry into effect the treaty with France of 1831, and by that board was also disallowed. The evidence of these decisions is derived from minutes on the dockets of the several boards of commissioners, but no document can be found in either case stating the principle on which the decision was founded."

This communicatian shows, what the petition admits, that the claim in question had been disallowed by both said boards of commissioners to which it was presented.

The petition, in order to show the liability of the Government of the United States, offers the following argument: "And your petitioner further shows, that the United States, in the treaties aforesaid, both with France and Spain, has in her sovereign capacity released those governments from all further reclamations and claims to indemnity than such as are therein provided for, of the like character as those therein provided for, and has thereby become responsible for claims of that character which have been excluded from the benefits of the provisions of said treaties."

This argument, which assumes the claim to have been valid against either Spain or France, has been already, we think, sufficiently answered. The boards of commissioners, legally organized for the determination of such claims as the one before us, have, upon the application of the petitioner himself, examined his claim and decided against its validity. The fact, therefore, assumed as the basis of the argument, namely, the validity of the claim against either Spain or France previously to the treaties referred to, does not exist.

The decisions of said boards of commissioners against the claim, like the judgment of a court of competent jurisdiction,

are, as we have before shown, a bar to this petition for the same demand.

It appears to the court, therefore, that the facts set forth in the petition do not furnish any ground for relief.

COURT OF CLAIMS.

SUSAN DECATUR
v.
THE UNITED STATES. } OPINION.

GILCHRIST, P. J., *delivered the Opinion of the Court.*

During the war between the United States and Tripoli, the frigate Philadelphia was stranded on the rocks on the Barbary coast, and in that situation was captured by the enemy. She was got off the rocks, manned, and made ready for sea by the Tripolitans, and moored in the harbor within pistol-shot of numerous batteries of heavy artillery. Lieutenant Decatur, the husband of the claimant, then commanding the schooner Enterprise, volunteered to board and recapture the Philadelphia. His offer was accepted; but in view of the hazards to which the undertaking was exposed, and the necessity of secrecy and celerity in the execution, Commodore Preble gave him a peremptory order not to attempt to bring the frigate out of the harbor, but in case of success, to be sure to set fire to the gun-room, berths, cock-pit, store-rooms, &c., and then, after blowing out her bottom, to abandon her. Lieutenant Decatur, it is alleged, could have safely brought the frigate out of the harbor, but did not do so on account of the peremptory order of Commodore Preble. He succeeded in performing his duty and destroying the frigate in a manner which received and entitled him to the admiration and applause of his country.

It is very evident from this statement that Lieutenant De-

catur did not *capture* the Philadelphia in a sense which entitled him to her proceeds or value as prize of war, within the meaning of the act of the 23d of April, 1800. The duty which he so gallantly performed, was that of her destruction, and not of her capture. His peremptory orders were to set her on fire, and, after blowing out her bottom, to abandon her. These orders were inconsistent with the idea of a capture. He was to retain possession of her only so long as was necessary to enable him to take the proper measures for her destruction. His orders were not only to destroy her, but they were so precise as to exclude the conclusion that he was to capture her. The object of the expedition was to destroy the frigate. In order to effect this object, it was necessary to obtain possession of her. But this possession was merely incidental, and was only one of the means to be adopted to effect the main purpose. It was not intended to obtain the possession for the purpose of bringing the frigate into port, and of obtaining a decree of condemnation, but for the mere purpose of her destruction. After the possession was obtained, she might or might not have been safely brought out of the harbor of Tripoli. That is a mere speculation as to probabilities. But the question before us is not whether she might have been captured, in a legal sense, but whether she was actually captured within the meaning of the law. The question is whether this claim is in the nature of the legal right secured by the prize act. It is not to be determined by the law of nations, but by the true intent and meaning of the acts of Congress.

The 5th Section of the act of April, 1800 (2 Stat., 52), provides that "the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize" * * * shall be the property of the captors. This is substantially a provision that the vessel is to be condemned, and that there is to be a legal adjudication that she is good prize, before the proceeds are to become the property of the captors. A sale by the captors does not divest the court of admiralty of its jurisdiction. In the case of *Williams* v. *Armroyd* (7 Cranch, 423), it was held that a sale before condemnation by one acting under the possession of the captor does not divest the court of jurisdiction, and the condemnation relates back to the capture, affirms its legality, and establishes the title of the purchaser. In the case of the Mary Ford (3 Dall., 188), it was held that immediately on a capture, the

captors acquired such a right as no neutral nation could justly impugn or destroy, but it is not intimated that they acquired an absolute right. Property captured in war belongs, in the first instance, to the nation.—The Dos Hermanos (10 Wheaton, 310). Whatever right the captors acquire is derived by grant. In the case of the Sally (8 Cranch, 382), it was held that the prize act of June, 26, 1812, operated as a grant from the United States to the captors of all property rightfully captured by commissioned privateers as prize of war. This shows that the mere taking possession of the property does not, of itself, vest the title to it in the captors. As the title depends on a grant, it must conform to the conditions of the grant. These conditions are that the vessel, after having been captured, shall be brought into port and condemned as lawful prize. In the case of *Jecker* v. *Montgomery* (13 Howard, 515), Mr. Chief Justice Taney says: "As a general rule it is the duty of the captor to bring it within the jurisdiction of a prize court of the nation to which he belongs, and to institute proceedings to have it condemned."

But as we have before said, the question is whether the Philadelphia was *captured* in the legal sense of the word. In the case of the Grotius (9 Cranch, 368), it was held that in order to constitute a capture, some act should be done indicative of an intention to seize and retain as prize; it is sufficient if such intention is fairly to be inferred from the conduct of the captor. In this case there is nothing from which such an intention can be inferred. The orders given and the acts done show that the sole object in taking possession of the frigate was to destroy her. The claimants have the same rights as, and no other rights than, other officers and men acquire, by the destruction of an enemy's property in war by the orders of their commanding officers, and it was never supposed that such a destruction of property was the foundation of a legal right.

While our opinion is, that the claimants have no legal cause of action against the United States which can be enforced in this court, we of course shall not be understood as wishing to detract from the merit of the gallant men who accomplished this enterprise, or to pluck a single leaf from their laurels. This feat of arms was performed under circumstances of peculiar difficulty and danger, with consummate skill, at night, in the face of powerful batteries, and with the most perfect self-possession and courage. By a vigorous

and well organized attack the enemy were suddenly deprived of the efficient means of resistance which the possession of the frigate would have afforded to our operations. The achievement has never been forgotten. It has always been regarded as one of the most brilliant of our naval successes. The case commends itself to the far-sighted liberality of Congress, by the fact that the most effective mode of insuring a spirit of devotion and self-sacrifice in naval and military operations, is to recognize the gallantry of the actors in them by such rewards as may stimulate the exertions of others. But such considerations are to be weighed by Congress, and not by this court. Our duty is performed by expressing our opinion on the case in its legal aspects, and that opinion is, that however strong the claims of the petitioner may be upon Congress, they have no legal cause of action against the United States.

COURT OF CLAIMS.

LETITIA HUMPHREYS, Administratrix, &c.,
v.
THE UNITED STATES.
} OPINION.

BLACKFORD, J. *delivered the Opinion of the Court.*

This is a claim by the administratrix *de bonis non* of Andrew Atkinson, deceased, against the United States. The claim is for interest on certain damages which, it is alleged, the intestate sustained in 1812 and 1813, by the operations of the American army in Florida.

To understand the nature of the claim, it will be necessary to refer to the treaty of 1819, between the United States and Spain, for the cession of the Floridas, and to certain acts of Congress of 1823 and 1834.

The ninth article of said treaty contains the following clause:

"The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers, and individual Spanish inhabitants, by the late operations of the American army in Florida."

In consequence of that clause in said treaty, Congress, on the 3d of March, 1823, passed the following act:

"*Be it enacted, &c.*, That the judges of the superior courts, established at St. Augustine and Pensacola, in the Territory of Florida, respectively, shall be, and they are hereby, authorized and directed to receive and adjust all claims, arising within their respective jurisdictions, of the inhabitants of said Territory, or their representatives, agreeably to the provisions of the ninth article of the treaty with Spain, by which the said Territory was ceded to the United States.

SEC. 2. *And be it further enacted*, That in all cases in which said judges shall decide in favor of the claimants, the decisions, with the evidence on which they are founded, shall be, by the said judges, reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the said treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged, out of any money in the treasury not otherwise appropriated."—3 Stat. at Large, p. 768.

On the 26th of June, 1834, Congress passed another act, as follows:

"*Be it enacted, &c.*, That the Secretary of the Treasury be and he hereby is, authorized and directed to pay, out of any money in the treasury not otherwise appropriated, the amount awarded by the judge of the superior court at St. Augustine, in the Territory of Florida, under the authority of the 161st chapter of the acts of the 17th Congress, approved third March, 1823, for losses occasioned in East Florida, by the troops in the service of the United States, in the years 1812 and 1813, in all cases where the decision of the said judge shall be deemed, by the Secretary of the Treasury, to be just: *Provided*, That no award be paid except in the case of those who, at the time of suffering the loss, were actual subjects of the Spanish government: *And provided also*, That no award be paid for depredations committed in East Florida, previous to the entrance into that province of the agent or troops of the United States.

"Sec. 2. *And be it further enacted*, That the judge of the

superior court of St. Augustine be, and he hereby is, authorized to receive, examine, and adjudge all cases of claims for losses occasioned by the troops aforesaid, in 1812 and 1813, not heretofore presented to the said judge, or in which the evidence was withheld, in consequence of the decision of the Secretary of the Treasury, that such claims were not provided for by the treaty of February 22, 1819, between the governments of the United States and Spain: *Provided*, That such claims be presented to the said judge in the space of one year from the passage of this act: *And provided also*, That the authority herein given shall be subject to the restrictions created by the provisoes to the preceding section."—6 Stat. at Large, p. 569.

After the passage of this act of 1834, and within the limited time, the administratrix of said Atkinson, deceased, presented her claim, under said acts of Congress, to the judge of the superior court at St. Augustine. The judge accordingly examined the testimony in the case, and in August, 1839, rendered a decree in favor of the claimant for $3,800, with interest at the rate of five per cent. per annum, from the 10th of May, 1813. The judge soon afterwards certified the proceedings, with the evidence in the case, to the Secretary of the Treasury of the United States, as the said acts of Congress required. The then Secretary, Mr. Woodbury, made the following decision in the case:

"In the within claim of Susan Murphy, administratrix of Andrew Atkinson, deceased, a claim under the ninth article of the treaty with Spain of the 22d of February, 1819, the sum of 2,300 dollars, being as much of the award of the judge of the superior court of East Florida, as is deemed just and proper, is *approved* without interest, in virtue of power vested in me by the act of the 26th June, 1834, entitled 'An act for the relief of certain inhabitants of East Florida.' The case is therefore referred to the First Auditor for settlement.

"LEVI WOODBURY,
"*Secretary of the Treasury.*

"TREASURY DEPARTMENT,
"*November* 28, 1839."

That amount of $2,300 was accordingly paid.

Afterwards, in September, 1852, the then Secretary of the Treasury, Mr. Corwin, made the following further decision in the case:

"TREASURY DEPARTMENT, *September* 21, 1852.

"In the within case of the estate of Andrew Atkinson, deceased, a claimant under the 9th article of the treaty with Spain of the 22d February, 1819, for losses in East Florida in the years 1812–'13, it appearing that an award, amounting to the sum of $3,800, was made by Judge Reid, at St. Augustine, on the 15th August, 1839, on which the sum of $2,300 was approved and paid under the decree of this Department, dated 28th November, 1839, as per statement filed in the office of the Register, No. 78,295; and it further appearing to the satisfaction of the Department, on a careful examination of the case, that the further sum of $1,500, included in said award, is justly due the said claimant, the said sum of $1,500 is allowed, without interest, as the balance in full of the entire claim, to be paid to the legal representative of the said Andrew Atkinson. Done in virtue of the power vested in me by the act passed the 26th June, 1834, for the relief of certain inhabitants of East Florida. Referred to the First Auditor for settlement.

"THO. CORWIN."

That sum of $1,500 was accordingly paid.

Therefore, the award of the judge, so far as regards the principal sum, has been approved, and the money paid; but so far as regards the interest, the award has been disallowed.

The administratrix *de bonis non* of said Atkinson now files her petition in this court in order to recover the interest, which the Secretary refused to pay, with damages for its non-payment.

This case, according to our view of it, depends upon two questions: First, whether the decision of the judge in Florida, in favor of the claim for interest, was subject to the review of the Secretary? and if it was, then, secondly, whether the judgment of the Secretary against the claim is final and conclusive as regards this court?

The clause in the Florida treaty, before referred to, provides that satisfaction be made for certain injuries, which should be established by process of law, to have been suffered by the then late operations of the American army in Florida; but it does not provide a tribunal by which the claims, on account of those injuries, should be decided. The appointment of such a tribunal was left by the treaty to be made by

the Government of the United States; and it was in consequence of the treaty, in that respect, that the act of 1823 was passed. There had been injuries committed in 1812 and 1813, and also in 1818, by the American army in Florida; and the Secretary of the Treasury had decided that the treaty did not apply to the injuries of 1812 and 1813. It was in consequence of that decision that the act of 1834 was passed, which provides for the injuries committed in 1812 and 1813. The acts of 1823 and 1834 must be considered as if their provisions were contained in the same act. The object of both acts is the same, namely, to furnish an appropriate remedy by which the injuries mentioned in the last clause of the ninth article of the treaty aforesaid might be established, and the satisfaction there alluded to be obtained.

It has been correctly said that the tribunal created by the act of 1823, and recognized by the act of 1834, consists of two parts: the judge in Florida constituting one, and the Secretary of the Treasury the other. The judge in Florida was to take the testimony, and determine upon the merits of the claims; and when he had decided in favor of a claim, he was required to report his proceedings, with the evidence, to the Secretary of the Treasury. And the Secretary, on being satisfied that the decision was just and equitable, within the provisions of the treaty, was to pay the amount.

It appears to us that the tribunal so constituted, is in accordance with the requirements of the treaty. The treaty required the injuries to be established by process of law. That phrase, process of law, when used in a treaty, must, says an eminent lawyer, "be interpreted according to the law of nations, and not according to our municipal code." And no authority has been referred to showing that such phrase has any technical meaning by the law of nations. It was for Congress to provide a tribunal before which the claimants might have an opportunity to establish their respective claims. The tribunal in question is such a one. It is, to be sure, not an ordinary court of justice, nor does the treaty require it to be so. It is a tribunal, however, where every claimant can have the merits of his claim fairly adjusted and decided, upon such evidence as he himself may think proper to furnish.

The Florida judges were, by the law, to act as commissioners. That is shown by the acts of 1823 and 1834, from which the judges derive their authority. The act of 1823 says, "that the judges of the superior courts, &c., are hereby authorized,"

&c. And the act of 1834 authorizes the Secretary to pay "the amount awarded by the judge of the superior court," &c. It says also, "that the judge of the superior court, &c., is hereby authorized," &c. So that the authority to adjust these claims is not given to the courts in Florida, but to the *judges* respectively. It is not judicial power, properly speaking, but that of a commissioner only, that is conferred. The claimant relies on the case of *The United States* v. *Todd*, decided by the Supreme Court of the United States in 1794, to show that the judges in Florida could not act as commissioners. But that case does not touch the question. The act of 1792, under which it was held that the judges of the circuit courts could not act as commissioners, did not confer, nor profess to confer, on the judges the power to act in the premises. It was only to the circuit courts that the authority was given. Had the act of 1792, like the acts of 1823 and 1834, given the power to the judges instead of to the courts, there is nothing in the case of *The United States* v. *Todd*, which shows that the judges could not have acted as commissioners. —See the case of *The United States* v. *Todd*, 13 Howard, 52, note. We have on this subject a late decision of the Supreme Court of the United States in a case arising under the same clause in the Florida treaty, and the same acts of Congress, with the case now before us. The language of the Chief Justice, in delivering the opinion of the court, is as follows:

"The law of 1823, therefore, and not the stipulations of the treaty, furnishes the rule for the proceeding of the Territorial judges, and determines their character. And it is manifest that this power to decide upon the validity of these claims, is not conferred on them as a judicial function, to be exercised in the ordinary forms of a court of justice. For there is to be no suit; no parties in the legal acceptation of the term are to be made; no process to issue; and no one is authorized to appear on behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte;* and all that the judge is required to do, is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence, nor his award, are to be filed in the court in which he presides, nor recorded there; but he is required to transmit, both the decision and the evidence upon which he decided, to the Secretary of the Treas-

ury; and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge.

"It is too evident for argument on the subject, that such a tribunal is not a judicial one, and that the act of Congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges, and their respective jurisdictions, are referred to in the law, merely as a designation of the person to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commissioner. The act of 1834 calls it an award."—*The United States* v. *Ferreira*, 13 Howard, 46, 47.

That opinion of the Supreme Court is in point to show, that the judge in those cases acts merely as a commissioner and not as a court. The proceedings of the judge in the case now before us do not purport to be the proceedings of a court. The judge calls his decision an "award," and signs it as follows: "Robt. Raymond Reid, Judge and Comr."

The copy of the proceedings sent by the judge to the Secretary of the Treasury has annexed to it the following certificate:

"TERRITORY OF FLORIDA, *District of East Florida.*

"I hereby certify that the foregoing pages, from one (1) to seventy-four (74) inclusive, contain a true copy of the claim of Mrs. Susan Murphy, the administratrix of Andrew Atkinson, deceased, the evidence taken therein, and the award thereon, the original of which are now of file in my office. Dated at St. Augustine, 15th August, 1839.

"ROBT. RAYMOND REID,
"*Judge and Comr.*"

The act of 1847, relative to this business of the judge, calls him a commissioner.—9 Stat. at Large, p. 130. The Supreme Court decides further in the above-cited case, that the creation of the judges as commissioners was a compliance with the treaty.

Considering the judge, therefore, with respect to these

claims, as a commissioner, and authorized to act as such in the premises, the case seems to be a very plain one. The judge examines and determines the case and reports his proceedings, with the evidence, to the Secretary of the Treasury, and the Secretary, if he find the decision of the judge to be just and equitable, within the provisions of the treaty, pays the claim, but not otherwise.

An objection has been made to considering the judge as a commissioner, on the ground that Congress had no authority to make such an appointment. But if that appointment is void, there is no foundation for the present claim. The law, as has been shown, gives no authority to the court in Florida to act in the premises. The report by the judge of his proceedings shows that he did not act as a court. He acted solely as a commissioner; and if he was not legally a commissioner, his proceedings are a nullity. And if his proceedings are a nullity, there is not only no ground for the present claim for interest, but the three thousand eight hundred dollars principal, formerly received for the estate of Atkinson from the Treasury, can be recovered back by the United States as having been received upon a void report.

The claimant's counsel contend that the act of 1823, in saying that the Secretary of the Treasury, on being satisfied that the decision "is just and equitable within the provisions of the treaty, shall pay the amount thereof," has a very limited effect. They contend that the act only means that the Secretary shall determine whether the case is within the provisions of the treaty, that is, whether the injury was committed in Florida; whether the person injured was a Spanish officer, or an individual Spanish inhabitant, &c.; but that it does not mean that the Secretary shall determine whether or not the decision is just and equitable. We feel very confident that the meaning of the act is not so limited. The language, indeed, of the act is directly to the contrary. If the Secretary's authority is limited, as the counsel contend, why does the act require that all the evidence taken shall be reported to the Secretary, and that he shall be satisfied before he pays the money, that the decision of the judge is just and equitable within the provisions of the treaty? If, as is admitted, the Secretary cannot pay the money awarded until he has ascertained, from the evidence, whether the case is within the provisions of the treaty, how is it possible for him to pay it until he has ascertained, by the same means, that the decision is

just and equitable? The same section of the act of 1823—the same sentence indeed—that requires the Secretary to make the former inquiry, requires him to make the latter also, before he pays the money.

The claims embraced by the acts of 1823 and 1834 were very large. Those that had been reported to the Secretary of the Treasury, amounted, in 1854, to two millions eight hundred and eight thousand seven hundred and three dollars and fifteen cents; of which claims, the Secretary had paid one million two hundred and twenty-four thousand nine hundred and ninety-two dollars and sixty-eight cents. The interest on the claims amounted, in 1854, to one million five hundred and fifty thousand four hundred and thirteen dollars.—See report of Secretary Guthrie, Senate Document No. 82, 33d Congress, 1st session.

Congress may not have known when the act of 1823 or that of 1834 was passed, that these claims would be so large; but it is fair to presume that they did know that the amount was entirely too large to be entrusted to the *final* decision of the two judges in Florida, each acting by himself on the cases before him. It was, therefore, to be expected that a review of their decisions would be provided for. That was accordingly done by making it the duty of the Secretary of the Treasury to revise the respective decisions of those judges, and not to pay any allowances of either of them which he did not find to be just and equitable.

That the provisions of the act of 1823, giving a revisory power to the Secretary as aforesaid, is perfectly consistent with the treaty, is expressly decided by the Supreme Court of the United States. The following is the language of the Chief Justice:

"Nor can we see any ground for objection to the power of revision and control given to the Secretary of the Treasury. When the United States consent to submit the adjustment of claims against them to any tribunal, they have a right to prescribe the conditions on which they will pay. And they had a right, therefore, to make the approval of the award by the Secretary of the Treasury one of the conditions upon which they would agree to be liable. No claim, therefore, is due from the United States until it is sanctioned by him, and his decision against the claimant for the whole or a part of a claim, as allowed by the judge, is final and conclusive. It cannot afterwards be disturbed by an appeal to this or any

other court, or in any other way, without the authority of an act of Congress.

"It is said, however, on the part of the claimant, that the treaty requires that the injured parties should have an opportunity of establishing their claims by a process of law; that process of law means a judicial proceeding in a court of justice, and that the right of supervision given to the Secretary, over the decision of the district judge, is, therefore, a violation of the treaty.

"The court think differently; and that the government of this country is not liable to the reproach of having broken its faith with Spain. The tribunals established are substantially the same with those usually created where one nation agrees by treaty to pay debts or damages which may be found to be due to the citizens of another country. This treaty meant nothing more than the tribunal and mode of proceeding ordinarily established on such occasions, and well known and well understood when treaty obligations of this description are undertaken. But if it were admitted to be otherwise, it is a question between Spain and that department of the government which is charged with our foreign relations; and with which the judicial branch has no concern. Certainly, the tribunal which acts under the law of Congress, and derives all its authority from it, cannot call in question the validity of its provisions, nor claim absolute and final power for its decisions, when the law, by virtue of which the decisions are made, declares that they shall not be final, but subordinate to that of the Secretary of the Treasury, and subject to his reversal."—*The United States* v. *Ferreira*, before cited.

It would seem that this opinion of the Supreme Court ought to settle the point that the tribunal in question, consisting of the judge as a commissioner, and the Secretary having a revising power, is in accordance with the treaty.

But, after all, we cannot believe that it is important for this court to inquire, whether the tribunal is or is not consistent with the treaty. We are bound to consider the tribunal to be properly constituted. The treaty stipulation that the United States would cause satisfaction to be made in certain cases, was a contract to be executed by Congress. Chief Justice Marshall on this subject says: "Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid

of any legislative provision. But when the terms of the stipulation import a contract, when either of the party engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department; and the legislature must execute the contract before it can become a rule for the court."—*Foster* v. *Neilson*, 2 Peters, 314. Congress has in this case, in the exercise of its exclusive jurisdiction, created a tribunal for the special purpose of determining these cases; and it is not for this or any other court to lessen or otherwise to interfere with the powers of that tribunal. There was no tribunal subsequently to the treaty to which the claimant could resort until the act of 1823. There is none now but the one which that act has established. The authority of the judge, as we have before said, depends not upon the treaty, but upon the acts of Congress of 1823 and 1834, and upon those acts alone. The legislative provisions, relative to the powers and duties of the judge and the Secretary of the Treasury, in these cases, cannot be separated. What kind of tribunal on the subject should be established, was a political question for Congress to determine. They have determined that the allowances made by the judge shall be subject, both as to his jurisdiction and as to the merits of the claim, to the revision of the Secretary; and no court can say that there shall be no such revision. The decision of the judge can have no effect, under the law, until the Secretary has decided upon the justice and equity of the claim. If, upon the evidence, the Secretary finds that the decision of the judge is not just and equitable, he is bound to reject it; and so, if he finds a part of the decision to be unjust and inequitable, he must reject that part.

We have now shown, we think, that whether the decision of the Florida judge in favor of the claim for interest was just and equitable, was a question for the determination of the Secretary of the Treasury. In arriving at this conclusion, it is a satisfaction to know that our opinion is based upon a decision of the Supreme Court of the United States. It is always gratifying to a court in deciding a case, to have in favor of its decision, a well-considered opinion of another judicial tribunal. It is especially so when that tribunal is, in every respect, the highest in the land. The case of *Ferreira* v. *The United States*, above referred to, was fully argued by eminent counsel, and the opinion of the court was delivered by its distinguished Chief Justice. The claimant contends

that the reasoning of the court in Ferreira's case is not authority. The question whether the court had jurisdiction depended, as the court considered, upon whether the decision of the judge in Florida was or was not the decision of a court; and whether it was subject to the revision of the Secretary of the Treasury. To determine these questions, an examination of the said treaty and acts of Congress was necessary. The court was of opinion that the judge acted as a commissioner and not as a court; and that the revisory power of the Secretary was unobjectionable. It was by virtue of that opinion that the court reached the conclusion that it had no jurisdiction of the case. The reasons given by the Supreme Court, to show that the judge acted merely as a commissioner, and that his decision was subject to the review of the Secretary, are, in our opinion, unanswerable.

The remaining question is, whether the decision of the Secretary of the Treasury, against the claim for interest, is not final and conclusive?

It appears to us to be very clear, that the Secretary's decision against the claimant puts an end to the demand. This judgment is sustained by the opinion of the Supreme Court of the United States in Ferreira's case before cited. The decision of the Secretary, as to the law and the facts, must be considered as the decision of a competent tribunal of exclusive jurisdiction. It stands upon the same ground with the decision of a board of commissioners appointed by or under a treaty to determine upon the amount and validity of such claims as the one before us. That the decision of such a board is conclusive, has been settled by the Supreme Court of the United States in the case of *Comegys* v. *Vasse*, 1 Peters, 212. The same point is decided by this court in the cases of *Thomas* v. *The United States*, and *Roberts* v. *The United States*.

Considering, as we do, the decision of the Secretary against the claim for interest as final, we have not found it necessary to extend our inquiry on the subject of interest beyond that decision.

It is the opinion of the court, for the foregoing reasons, and upon the authorities cited, that the claimant has shown no ground for relief.

COURT OF CLAIMS.

MARY REESIDE, Executrix, &c.
v.
THE UNITED STATES.
} OPINION.

GILCHRIST, P. J., *delivered the Opinion of the Court.*

The claimant states the following case:

In the year 1839, there were accounts to a large amount unsettled between her testator and husband, James Reeside, and the United States. He alleged that there was a balance due him of $275,000, and the United States alleged that there was a balance of $47,000 due to them. In that year (1839) the United States commenced a suit against him in the circuit court of the United States for the eastern district of Pennsylvania. The trial was had in the month of October, 1841. It occupied five weeks, and the jury were engaged two weeks in the investigation of the case. After a careful consideration of the facts, the jury found a verdict against the Government, and certified, also, on the issue of the plea of set-off, that the Government owed the defendant the sum of $188,496 06. The counsel for the United States then moved for a new trial, but only because they hoped to reduce the balance found in favor of the defendant. After argument that motion was overruled by the court, and an elaborate opinion was delivered to that effect, and a judgment was pronounced in bar of the action, but no formal judgment for execution was rendered on the verdict, because, and only because, the Government could not then be sued, nor could it be coerced to make payment by execution. After the motion for a new trial was overruled, the United States took some steps towards suing out a writ of error to the Supreme Court, but it was dismissed; and the United States never in any other mode sought a revision of the verdict, or a reversal of the judgment, nor was the evidence given on the trial shown by a bill of exceptions or otherwise.

The claimant insists that the verdict should conclude all

further controversy as to the facts which were litigated, and should be deemed record and indisputable evidence that the United States owed the sum of $188,496 06 at the date of the verdict, and alleges, also, that she is entitled to interest on the amount of the verdict from the time when it was returned.

A transcript of the record has been offered in evidence, dated on the 6th day of December, 1841, from which it appears that the jury "find for the defendant, and certify that the plaintiffs are indebted to the defendant in the sum of $188,496 06." The counsel for the plaintiffs moved for a rule to show cause why a new trial should not be granted; and on the 9th of December, reasons for a new trial were filed. On the 12th of May, 1842, the motion for a new trial was refused, and judgment was rendered on the verdict. On the 1st of August, 1842, the plaintiffs sued out a writ of error, which, in January, 1849, with a transcript of the record of the judgment, &c., was transmitted to the Supreme Court. The writ of error was subsequently dismissed by the Supreme Court.

The question before us naturally divides itself into three parts:

1. Is the record of the verdict, and judgment thereon, competent evidence for the petitioner?

2. If admissible, what is its effect?

3. Is the petitioner entitled to interest on the amount of the verdict?

I. The thirty-fourth section of the act of Congress of September 24, 1789 (1 St., 92), commonly called the judiciary act, provides "that the laws of the several States, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

In the case of *Wayman* v. *Southard*, 10 Wheat. 24, Mr. Chief Justice Marshall says: "This section has never, so far as is recollected, received a construction in this court; but it has, we believe, been generally considered by gentlemen of the profession as furnishing a rule to guide the court in the formation of its judgment, not one for carrying that judgment into execution. It is 'a rule of decision,' and the proceedings after judgment are merely ministerial. It is, too, 'a rule of decision in trials at common law,' a phrase which presents

clearly to the mind the idea of litigation in court, and could never occur to a person intending to describe an execution or proceedings after judgment, or the effect of those proceedings."

According to this decision, this section has nothing to do with the proceedings after judgment. It means only that the judgment shall be rendered according to the laws of the State. What the proceedings may be after the rendition of the judgment, or how the judgment is to be enforced, is not a matter into which the court will inquire. The Chief Justice expressly says, that in framing the thirty-fourth section, the legislature could not have extended its views beyond the judgment of the court, and that it has no application to the practice of the court, or to the conduct of its officers, in the service of an execution. It refers solely to the judgment, and the nature of the judgment, and its effect must be determined by the laws of the State.

The first section of the Pennsylvania act of Assembly of 1705, (1 Smith's Law, 49; Franklin's Laws, 88,) enacts that, "if it appear to the jury that the plaintiff is overpaid, then they shall give in their verdict for the defendant, and withal certify to the court how much they find the plaintiff to be indebted or in arrear to the defendant, more than will answer the debt or sum demanded, and the sum or sums so certified shall be recorded with the verdict, and shall be deemed as a *debt of record;* and if the plaintiff refuse to pay the same, the defendant, for recovery thereof, shall have a *scire facias* against the plaintiff in the said action, and have execution for the same, with the costs of that action."

Upon the trial of this case, no exception was taken that the set-off was improperly admitted, or that in a suit by the United States the jury might not legally certify the balance found due to the defendant. The case of *The United States* v. *The Bank of the Metropolis*, 15 Peters, 377, decides, that individuals when sued by the United States, may avail themselves of credits or set-offs against the United States.

In Ramsey's appeal, 2 Watts, 231, the Supreme Court of Pennsylvania decided that, when judgment was rendered on a verdict against the plaintiff, the debt was "a debt of record." In the case of *Reeside* v. *Walker*, 11 Howard, 272, Mr. Justice Woodbury, in denying the application for a *mandamus*, speaks of this as a *debt of record*, citing the decision in Ramsey's appeal, 2 Watts, 230. Judge Woodbury's opinion ap-

pears to proceed on the ground that the United States cannot be sued, and that no *scire facias* had been issued. But the Pennsylvania act of April 11, 1848, provides that, "in all cases where, by the verdict of a jury, any debt or damages *shall have been* found, or certified in favor of the defendant, he shall be entitled to judgment and execution in like manner as if the verdict had been in favor of the plaintiff, and the defendant need not resort to a writ of *scire facias* as required by the act of 1705 for defalcation."

That this is a "debt of record" we consider fully established. Chief Justice Gibson, in the case of Dougherty's estate, 9 Watts and S. 195, says that the *scire facias* is "only a judicial writ, is no new suit, but a mere handmaid in the original cause, and a step towards execution." Nor can we regard it as being anything substantially, to all intents and purposes, but a judgment by a court of competent jurisdiction, that the defendant is entitled to recover of the United States the sum certified by the jury to be due, after a full hearing of the merits of the matters in controversy between the parties.

II. The second question is, what is the effect of such a judgment?

It is well settled at common law that a judgment, where the same matter is in issue, is conclusive, and binds parties and privies. Such is also the decision of the Supreme Court in the cases of *Hopkins* v. *Lee*, 6 Wh. 109, and *The Bank of the United States* v. *Beverley*, 1 Howard, 134. A judgment of a court of the United States, though voidable for error, cannot be impeached collaterally; it is valid and binding until reversed by a writ of error. *Huff* v. *Hutchinson*, 14 Howard, 586. A judgment of a State court has the same credit, validity, and effect in every other court within the United States, which it had in the State where it was rendered. *Hampton* v. *McConnell*, 3 Wh. 234. In the cases of *Cardesa* v. *Humes*, 5 S. & R. 65, it is said: "In no case, nor under any circumstances, can the merits of the original judgment be inquired into for the purpose of a defence to a *scire facias*." In the case of *Mills* v. *Duryee*, 7 Cranch, 481, Mr. Justice Story says: "It is argued that this act (26 May, 1790) provides only for the admission of such records as evidence, but does not declare the effect of such evidence when admitted. This argument cannot be supported. The act declares that the record, duly authenticated, shall have such faith and credit as it has in the

State court from whence it is taken If, in such court, it has the faith and credit of evidence of the highest nature—namely, record evidence—it must have the same faith and credit in every other court. Congress have, therefore, declared the effect of the records by declaring what faith and credit shall be given to it."

It is argued that the United States cannot be sued, that a set-off is a cross action, and that to hold that this balance found due by the jury, was a debt against the United States, would be contrary to the doctrine that the sovereignty cannot be sued. But the United States have already, to a certain extent, consented that they may be sued, by the act allowing a defendant to file a set-off. There is nothing in the law which prohibits the defendant from having allowed to him a larger sum than the United States are seeking to recover. If the balance found due from the United States has not the effect of a debt of record, what becomes of the provision of the act of May 26, 1790, that a record shall have the same faith and credit which it has in the State court? We can, in fact, see no difference between the effect of a judgment between private persons, of this character, and a judgment in a case where the United States are plaintiffs, except that the judgment cannot be enforced by execution against the United States. It is still a judgment upon the matters in issue, and its payment is left not to the service of process, but to the faith of the United States. In one sense there can be, according to the argument for the United States, no debt whatever against the United States, because they may refuse to pay any claim, even the national debt, and no one has the power to enforce the payment of it. But it would be an extraordinary argument, that they did not owe a debt because they had not themselves pointed out a means whereby a claimant could recover what would be considered a debt between man and man, and what is honestly a debt. And this is the very question before us, whether the United States do owe this debt, not whether there is any process by which to enforce it, for confessedly there is none. "The right of a court to issue execution," says Mr. Justice Story, in the case of *Mills* v. *Duryee*, "depends upon its own powers and organization. Its judgments may be complete and perfect, and have full effect independent of the right to issue execution. * * We can perceive no rational interpretation of the act of Congress, unless it declares a judgment conclusive when a court of the

particular State where it is rendered, would pronounce the same decision." That the verdict and judgment thereon are conclusive, also appears from the 7th article of the amendments to the constitution, which provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

III. As to the interest upon the amount of the verdict, the judiciary act of 1789, which provides that the laws of the several States shall be regarded "as rules of decision," refers this point to be determined by the laws of Pennsylvania. The provincial act of Pennsylvania, passed in the year 1700, 1 Smith's Laws, 7, provides that "lawful interest shall be allowed to the creditor for the sum or value he obtained judgment for, from the time the said judgment was obtained till the time of sale, or till satisfaction be made." By the act of 2d March, 1723, 1 Smith's Laws, 156, legal interest was fixed at 6 per cent., and such is now the rate in Pennsylvania. In the case of *Fitzgerald* v. *Caldwell's Executors*, 4 Dallas, 252, it was decided, that interest was a legal incident to every judgment, and this decision has been repeatedly affirmed. In *Respublica* v. *Mitchell*, 2 Dallas, 101, it was resolved that the State was liable to pay interest as well as individuals. Upon this subject the decision in the case of *Thorndike* v. *The United States*, 2 Mason, 20, is in point. That was a case where the United States were lawfully parties to a suit at law, and as such were bound by the law which regulated the rights of parties. Mr. Justice Story said: "The United States have no prerogative to claim one law upon their own contracts as creditors, and another as debtors. If, as creditors, they are entitled to interest, as debtors they are bound also to pay it."

An argument has been addressed to us by one of the counsel for the claimant, for the purpose of showing that under the constitution a citizen may sue the United States without their consent. But there are numerous *dicta* showing the opinion of the Supreme Court to the contrary. It perhaps would be promotive of justice, if the United States could be sued. Mr. Chief Justice Jay, in the case of *Chisholm* v. *Georgia*, 2 Dallas, 478, says: "I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could

in the peaceable course of law be compelled to do justice, and be sued by individual citizens." Mr. Justice Story, while lamenting the absence of any provisions to enable the creditors of the United States to sue, takes it for granted that such provisions would be constitutional, and refers to the English proceeding of a petition of right. Story's Comm., § 1672. But the general liability of the United States to be sued, is not a question before us. It is enough to say, that when the United States voluntarily submit themselves to the jurisdiction of a court, which is governed in its adjudications by the laws of a particular State, and those laws provide that a balance found by a verdict of a jury against the plaintiff, shall be "a debt of record," we can conceive of no process of logical reasoning which could induce us to consider a judgment upon such a verdict, as anything but a "debt of record," which the United States are bound to pay.

The opinion of the court is, that the United States owe the claimant the sum of $188,496 06, with interest thereon, from the 6th day of December, 1841, and we report a bill accordingly.

COURT OF CLAIMS.

STURGES, BENNETT & Co. *v.* THE UNITED STATES. } OPINION.

SCARBURGH, J., *delivered the Opinion of the Court.*

In this case the petitioners allege, that during the years 1847, 1848, 1849, and 1850, they imported into the United States certain quantities of brandy and other liquors in casks, and paid duties thereon at the rate of one hundred *per centum*, not only on the value of the quantity of liquor ascertained by gauge to be contained in the cask, but also on the value of the quantity of liquor which had leaked out of the casks on the voyage of importation; and that they claim a return of the moneys exacted from them as import duties on such leakage, or non-imported liquors.

The petitioners refer in their petition to a statement pre-

pared by the collector of New York, by order of the Secretary of the Treasury, for a particular account of their claim. From this statement, it appears that, under instructions of the Secretary of the Treasury, the duties upon their importations were levied according to their invoice value, without reference to deficiencies, unless arising from accident at sea. It was conceded in the argument submitted in this case that the leakage arose not from any accident at sea, but from other causes, and that the deficiency was ascertained from the return of the gaugers.

The act of Congress entitled "An act reducing the duty on imports, and for other purposes," approved July 30, 1846, imposed a duty of *one hundred per centum ad valorem* on brandy and other spirits, distilled from grain and other materials imported from foreign countries. According to the principles settled by the cases of *Marriott* v. *Brune*, 9 How. R. 619; *The United States* v. *Southmayd*, Ibid, 637; and *Lawrence* v. *Caswell*, 12 How. R. 488—this duty is imposed, not upon the quantity of brandy which may have been purchased abroad, but upon the quantity which actually arrives in the country.

In the case of *Marriott* v. *Brune*, duties had been imposed upon importations of sugar and molasses made after the act of 1846, according to invoice quantity; but the report of the weighers and gaugers showed a deficiency between that quantity and the quantity actually imported. Mr. Justice Woodbury, who delivered the opinion of the court, said: "The general principle applicable to such a case would seem to be, that revenue should be collected only from the quantity or weight which arrives here. That is, what is *imported;* for nothing is imported until it comes within the limits of a port. (See cases cited in *Harrison* v. *Vose*, 9 Howard, 372.) And by express provision in all our revenue laws, duties are imposed only on imports from foreign countries, or the importation from them, or what is imported. (5 Stat. at Large, 548, 558.) The very act under consideration imposes the duty on what is imported from foreign countries. (p. 68.) The Constitution uses like language on the subject. (Article 1, §§ 8, 9.) Indeed, the general definition of customs confirms this view; for, says McCullough (Vol. 1, p. 548): 'Customs are duties charged upon commodities on their being imported into or exported from a country.'

"As to imports, they therefore can cover nothing which is not actually brought into our limits. That is the whole

amount which is entered at the custom-house; that is all which goes into the consumption of the country;—that, and that alone, is what comes in competition with our domestic manufactures; and we are unable to see any principle of public policy which requires the words of the act of Congress to be extended so as to embrace more.

"When the duty was specified on this article, being a certain rate per pound before the act of 1846, it could of course extend to no larger number of pounds than was actually entered. The change in the law has been merely in the rate and form of the duty, and not in the quantity on which it should be assessed.

"On looking a little further into the principles of the case, it will be seen that a deduction must be made from the quantity shipped abroad whenever it does not all reach the United States, or we shall in truth assess here what does not exist here. The collection of revenue on an article not existing, and never coming into the country, would be anomaly—a mere fiction of law—and is not to be countenanced when not expressed in acts of Congress, nor required to enforce just rights."

The same doctrine is directly applied to importations of brandy, in the case of *Lawrence* v. *Caswell.*

It is moreover held in these cases, that the quantity actually imported is to be ascertained by the gauger's return. In the case of *Lawrence* v. *Caswell*, the question whether the duty ought to be computed on the quantity stated in the invoice, or on the contents as ascertained by the gauger's return, was, *in terms*, considered by the court, and the decision was that the duty ought to be computed on the latter, and that this question was substantially the same with that decided in the case of *Marriott* v. *Brune.* It may be true, as suggested by the Solicitor, that there is no mode in which the quantity imported can be ascertained without absolute certainty; but there can be no doubt, we think, that the decision of the supreme court recognizing the measurement by gauge as the proper legal method for that purpose, is in conformity both to the acts of Congress and to the usage of the Government of the United States for more than half a century.

It is apparent, therefore, that the duties now sought to be reclaimed, were paid upon brandies not actually imported, and, consequently, that they were not imposed by law. If, therefore, the petitioners be not entitled to relief, it is not be-

cause they have not paid the United States money which the acts of Congress did not require them to pay, but because they paid it under such circumstances as took from them the right to require its re-payment.

Prior to the act of March 3d, A. D. 1839, an importer might maintain an action for the recovery of the excess of duties, or for the recovery of duties illegally exacted against a collector, in two classes of cases: 1st, where the payment was made for unascertained or estimated duties; and, 2d, where it was made under protest. These two classes are distinctly recognized by DANIEL, J., in the opinion delivered by him for the majority of the court, in the case of *Carey* v. *Curtis*, 3 Howard's R. 243. He said: "It will be remembered that the two principal cases, in which collectors have claimed the right to retain, have been those of unascertained duties, and of suits brought, or threatened to be brought, for the recovery of duties paid under protest. It is matter of history that the alleged right to retain on these two accounts, had led to great abuses and to much loss to the public; and it is to these *two* subjects, therefore, that the act of Congress particularly addresses itself." Again: "Besides the litigation spoken of, and which is said to lead to this result, is a litigation for duties paid under protest, and not for over-payment of unascertained duties." (9 How. 242.) Again: "Independently of this statute, the collector might have been sued for over-payments on unascertained duties, as well as for duties paid under protest. And it can hardly be reconciled with reason or consistency, that Congress designed to preserve the right of suit in the one case and deny it in the other. Yet, if these words would have the force contended for by the defendant in error, they give the right of action against the collector for duties paid under protest only, leaving the party who has overpaid unascertained and estimated duties no remedy but that of restoring to the Secretary of the Treasury." *Ibid.* 244.

The effect of the act of March 3d, 1839, was to take away the right of action against collectors in both these classes of cases. (*Carey* v. *Curtis*, 3 Howard's R. 236.) But by way of compensation to the importer for the loss of his remedy by action, this act made it the duty of the Secretary of the Treasury, where it should be shown to his satisfaction that in any case of unascertained duties, or duties paid under protest, more money had been paid to the collector, or person acting as such, than the law required should have been paid, to take

the prescribed measures to have it refunded to the person entitled to the over-payment. It may be proper to remark at this point, (1) that this act did not in any way affect, or propose to affect, the right of a party making an over-payment in any case therein mentioned to re-payment; and (2) that the power which it confers upon the Secretary of the Treasury is purely *administrative*, and in no sense judicial. If, therefore, under this act, an importer, in a case either of unascertained duties, or of duties paid under protest, paid to a collector more money than he was by law required to pay, but could not show to the satisfaction of the Secretary of the Treasury that he had done so, he was without any enforceable remedy; but nevertheless, the action of the Secretary of the Treasury not being *judicial*, but merely *administrative*, the implied contract of the United States to refund to the importer what had been taken or detained from him without authority of law, still remained unsatisfied and undischarged.

Soon after the decision in the case of *Carey* v. *Curtis* was made, the act of February twenty-sixth, A. D. eighteen hundred and forty-five, was passed. What changes in the law were effected by it? 1. It restored *sub modo* the right of action against a collector in cases of duties paid under protest. And, 2. It required the protest to be made in writing and signed by the claimant at or before the payment of the duties, setting forth distinctly and specifically the grounds of objection to the payment thereof. It is as follows: "That nothing contained in the second section of the act entitled 'An act making appropriations for the civil and diplomatic expenses of the Government, for the year one thousand eight hundred and thirty-nine,' approved on the third day of March, one thousand eight hundred and thirty-nine, shall take away, or be construed to take away, or impair the right of any person or persons who have paid or shall hereafter pay money as and for duties under protest to any collector of the customs or other person acting as such, in order to obtain goods, wares, or merchandise, imported by him or them, or on his or their account, which duties are not authorized or payable in part or in whole by law, to maintain any action at law against such collector or other person acting as such, to ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial by jury touching the same, according to the due course of law. Nor shall anything contained in the second section of the act aforesaid be construed

to authorize the Secretary of the Treasury to refund any duties paid under protest; nor shall any action be maintained against any collector to recover the amount of duties so paid under protest, unless the said protest was made in writing and signed by the claimant at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." (5 Stat. at Large, 727.)

But this act is silent upon the subject of unascertained duties. It mentions only duties paid under protest. It is wholly inapplicable, therefore, to unascertained duties, and the rights of an importer in reference to the latter remained the same after as they were before the passage of that act.

The only remaining act of Congress at all connected with the subject is the act of August 8, A. D. 1846. The second section of that act is as follows: "That the Secretary of the Treasury be, and he is hereby authorized, out of any money in the Treasury not otherwise appropriated, to refund to the several persons entitled thereto such sums of money as have been illegally exacted, by collectors of the customs under the sanction of the Treasury Department, for duties on imported merchandise since the third of March, eighteen hundred and thirty-three: *Provided* that, before any such refunding, the Secretary shall be satisfied, by decisions of the courts of the United States upon the principle involved, that such duties were illegally exacted: And *provided*, also, that such decisions of the courts shall have been adopted or acquiesced in by the Treasury Department as its rule of construction." (9 Stat. at Large, 84.)

The statute has no application to unascertained duties. It in terms only applies to duties *illegally exacted.* Now, unascertained duties, in the strictest sense of those terms, certainly is applicable to a case like the one now under consideration, are not illegally exacted. There can be no illegality as respect them, except in the detention of the over-payment after the true amount of duties has been legally ascertained.

When an entry is made, the collector jointly with the naval officer, or alone where there is none, is required by law to make a gross estimate of the amount of duties on the goods entered, and if the goods be entered for home consumption and not warehoused, no permit will be granted for landing them until such estimated duties are paid. (1 Stat. at Large, p. 664, § 49; 1 *Ibid.*, p. 673, § 62; 9 *Ibid.*, p. 53, § 1.) And if it be necessary, in order to ascertain the duties thereon, to weigh,

gauge, or measure the goods, they cannot, without the consent of the proper officer, be removed from the place where they are landed, before they have been weighed, gauged, or meas ured; and if spirits, before the proof or quality and quantity thereof are ascertained and marked thereon, by order or under the direction of the proper officer for that purpose. (1 Stat. at Large, p. 665, § 51.) So far, therefore, from unascertained duties being duties illegally exacted, they are always demanded and paid in strict conformity to law. The very terms imply that duties are, to some extent, imposed and payable in the particular case, but that the true amount is unknown and unascertained at the time of payment.

The law, in its requirements upon this subject, looks both to the security of the United States and to the interests of the importer; the just demands of the United States are secured by the payment of the estimated duties, and the goods are liberated without any unnecessary delay, so that they may at once go into the possession of the importer and enter into his business. But the object, as regards the United States, is to secure their just demands, and nothing more; and the payment is made under an implied contract on the part of the United States, that the excess, if any, beyond the amount of duties actually imposed by law, shall be refunded to the importer. There can be no doubt, then, that in the legal sense, unascertained duties are never illegally exacted, and, consequently, that the second section of the act of August 8, 1846, does not apply to them.

According to these principles, the case under consideration is, in its nature, a case of unascertained duties; but it is insisted on the part of the United States, that at the time when the importations which it embraces were made, the duties thereon, under a regulation of the Treasury Department, were required to be computed on the invoice quantity, and that the duties in question were therefore ascertained at the time of their payment. Without pausing to inquire whether the consequences deduced from this regulation would necessarily have followed, it is sufficient to remark, that the regulation itself was in conflict with law and invalid.—*Marriot* v. *Brune; The United States* v. *Southmayd; Lawrence* v. *Caswell.*

"The Secretary of the Treasury is bound by the law, and although in the exercise of his discretion he may adopt necessary forms and modes of giving effect to the law, yet neither he nor those who act under him can dispense with or alter

any of its provisions. It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights and unsupported by law, should afford no ground for legal redress." Per Mr. Justice McLean, in *Tracey* v. *Swartwout*, 10 Peters' R. 95.

"Any instructions from the Treasury Department could not change the law." Per Mr. Justice Thompson, in *Elliott* v. *Swartwout*, 10 Peters' R. 135.

"The various circulars from the Treasury Department, which have been referred to, and which have been construed in some cases to permit the deduction of the quantity not really arriving in this country, and in others to forbid it, are entitled to much respect in deciding on the true meaning of the revenue laws; but when contradictory or obscure, they furnish less aid, and are *never* decisive or incontrollable." Per Mr. Justice Woodbury, in *Marriott* v. *Brune*, 9 Howard's R. 634, 635.

"The orders as well as the opinions of the head of the Treasury Department, expressed in either letters or circulars, are entitled to much respect, and will always be duly weighed by this court; but it is the laws which are to govern, rather than their opinions of them: and importers, in case of doubt, are entitled to have their rights settled by the judicial exposition of these laws rather than by the views of the Department. (*Marriott* v. *Brune*, 9 Howard, 634, 635.) And though, as between the custom-house officers and the Department, the latter must by law control the course of proceedings, (5 Stat. at Large, 566,) yet as between them and the importers, it is well settled that the legality of all their doings may be revised in the judicial tribunals. *Tracy et al.* v. *Swartwout*, 10 Peters, 95; *United States* v. *Lyman*, 1 Mason's C. C. 534; Opinions of Attorneys-General, 1015." Per Mr. Justice Woodbury, in *Greely* v. *Thompson*, 10 Howard's R. 234.

The regulations of the Treasury Department referred to by the Solicitor cannot, therefore, have the influence or effect claimed for it in his argument. The duties in question here are, in their nature, under the acts of Congress, unascertained at the time of their payment, and no regulation of the Treasury Department could deprive the petitioners of the right vested in them by law so to consider and treat them. The

obvious reason is, that no such regulation can change the supreme law of the land.

This, then, being a case of unascertained duties, it was competent for the Secretary of the Treasury, under the act of March 3d, 1839, which, for this purpose, is still in force, if it had been shown to his satisfaction that more money had been paid to the collector than the law required should have been paid, to have taken the measures presented by that act to have it refunded to the petitioners. But this, the petitioners allege, he has refused to do upon the grounds that no protest was made, and that a portion of the claim was barred by the statute of limitations. The petitioners, therefore, are entitled to relief unless the action of the Secretary of the Treasury is conclusive against them. We have already stated, that the power of the Secretary of the Treasury under that act is purely administrative, and in no sense judicial. This is sufficiently obvious from the very terms of the act. It did not vest the Secretary of the Treasury with the power of deciding upon the rights of the claimant, except to the extent that he might be required to act upon them. It made it a condition precedent to the party's right to the Secretary's warrant upon the Treasurer for the over-payment, that he should satisfy the former that his claim belonged to one of the classes mentioned in the act, and was well founded. This mode of redress was thus conditioned and restrained, and for wise and good reasons. It would not have been either proper or politic to have authorized a payment out of the public treasury, to a party whose rights had not been regularly adjudicated and legally ascertained, except upon the very condition imposed by the statute, that he should show to the satisfaction of the head of the Treasury Department that his case was one for which the statute meant to provide. It was not designed that he should obtain relief from a ministerial officer, unless his case was shown to be one on which such officer could act with entire safety to the public interests. If he failed to show such a case, then he failed to obtain the benefit of the statutory remedy; but it was not designed that his rights should be otherwise affected. The implied contract of the United States, in a case of unascertained duties to refund the over-payment, would still continue in full vigor—the decision of the Secretary of the Treasury affecting merely his own official action, and nothing more. And it is no answer to this view,

that in such a case the party was without remedy, except by an appeal to the legislative department of the government; for if that were sufficient, then there would be but few cases of contract of which this court could take cognizance.

[Testimony to be taken accordingly.]

COURT OF CLAIMS.

JAMES BEATTY'S Executor, *v.* THE UNITED STATES. } OPINION.

SCARBURGH, J., *delivered the Opinion of the Court.*

JAMES BEATTY, late a merchant of the city of Baltimore, imported from Calcutta, into Baltimore, in January, A.D. 1845, by the barque Active, 3,197 bags of saltpetre, usually denominated crude saltpetre, and made due entry of the same for consumption, at the collector's office; and in his entry he erroneously, and by mistake, and for want of a knowledge of its character, described 2,197 bags thereof as "partially refined saltpetre," and 1,000 bags as "crude saltpetre," and free from duty, when the entire importation was "crude saltpetre."

The entire importation was reported by the revenue officers as "saltpetre partially refined," and a duty thereon, at the rate of $\frac{1}{4}$ of one cent *per* pound, amounting to $\$1{,}548\ \frac{52}{100}$, was exacted of the importer and paid by him. So much of the duty as was exacted on the 1,000 bags—amounting to $\$461\ \frac{11}{100}$, was paid under protest, and subsequently recovered in an action instituted by the importer against the collector.

The petitioner alleges, that the whole importation was "crude saltpetre;" that there is no such thing known in commerce as "partially refined saltpetre;" and that, in the commercial sense, all saltpetre is included under two denominations: "refined saltpetre," and "crude saltpetre."

We are obliged, at the present stage of this case, to assume that these allegations are true. The rule is well settled, that the denomination of articles in tariff laws, is to be construed according to the commercial understanding of the terms used;

and that, whether the imported article is or is not known in commerce by the words or terms used in the tariff law, is a question of fact, and not of law.—*United States* v. 112 *Casks of Sugar*, 8 Peters' R. 277; *Elliot* v. *Swartwout*, 10 Peters, 151, 153; *United States* v. *Breed*, 1 Sumner's R. 154; Two Hundred Chests of Tea, 9 Wheaton's R. 430; *Curtis* v. *Martin*, 3 How. R. 106; *Lawrence* v. *Allen*, 7 How. R. 785, 796–'7.

We also assume that, if there be any case to which the statute law concerning protests is fully applicable, this is such a case. As, therefore, no protest was made *quoad* the subject now claimed, the question is directly presented for the consideration of this court, whether the want of the protest is conclusive against the petitioners.

In order to present an intelligible view of this question, it is proper to consider it (1) as if the acts of Congress of March 3, A. D. 1839, and February 26, A. D. 1845, had not been passed; and then (2) to inquire how far it is affected by those acts.

(1.) First, then, what would be the rights of the petitioner if the acts of 1839 and 1845 had not been passed?

There can be no doubt, taking as we must for the present, the allegations of the petitioner to be true, that the money now claimed was paid to the United States by James Beatty, upon the supposition that the saltpetre entered "as partially refined saltpetre," was "partially refined saltpetre;" that in fact it was "crude saltpetre;" that, being "crude saltpetre," it was, under the act of 1842, free from duty; and that the money would not have been paid if the fact, that the subject on which the duty was assessed was "crude saltpetre," had been known to the importer. This, then, is a case where money, to which the party receiving it was not entitled, was paid under a mistake of fact, and it would not have been paid if the fact had been known to the party making the payment. In such a case, between man and man, the doctrine is too well settled to admit of doubt or question, that an action would lie to recover back the money, and that it would be unconscientious to retain it.

An impression at one time existed that, in order to recover back money paid under a mistake of fact, the party must show that at the time of payment he not only did not know the fact, but that he had no *means* of knowing it. The impression was to some extent countenanced in the case of *Bilbie* v. *Lumley*, 2 East. R. 469; but it was founded chiefly on the

dictum of Mr. Justice Bayly in the case of *Milnes* v. *Duncan*, 6 Barn. & Cr. 671. It has, however, long since been abandoned. The more just and reasonable doctrine, that the knowledge of facts, which would disentitle a party from recovering, must be a knowledge existing in the mind at the time of payment, is now well established. *Kelly* v. *Solari*, 9 Mee. & W. 54; *Bell* v. *Gardiner*, 4 Man. & Gr. 11. Hence, where a party once had full knowledge of a fact, which he had forgotten at the time of making the payment, his forgetfulness of it was such a *mistake* of fact as entitled him to recover back the money. *Kelly* v. *Solari*. In that case, Parke, B., said: "If money is paid under the impression of the truth of a fact, which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact." It may often happen that the possession of the means of knowledge would afford strong evidence of actual knowledge, but there is no conclusive rule of law that, because a party has the means of knowledge, he has the knowledge itself. *Bell* v. *Gardiner*. Although, therefore, James Beatty might, by instituting the proper inquiry, have ascertained that there is no such thing known in commerce as "partially refined saltpetre," and that his whole importation was what is denominated in trade "crude saltpetre," yet, if at the time of payment he did not actually know this, he paid the duties thereon under such a mistake of fact as would, if it were a case between man and man, entitled him to recover the money back.

Prior to the act of March 3, A. D. 1839, there were two modes of proceeding in such cases as the present: first, by a suit against the collector; and second, by petition to the legislative department of the government. If this case had occurred before the passage of the act of 1839, and while the money was still in the hands of the collector, the importer had given him notice of the mistake, and that he meant to hold him personally responsible for the money, or, to use what seems to be the technical language applicable to this subject, had protested against its payment, there can be no doubt that an action therefor might have been maintained against the collector. *Elliott* v. *Swartwout*, 10 Peters' R. 137; *Swartwout* v. *Gihon*, 3 How. R. 110. And there can be as little doubt that, although such notice or protest was essential to the maintenance of the action against the collector, it was in no way

necessary to the support of the petition to the legislative department of the government. We speak now of both these modes of proceeding as alike applications for justice; for we hold, that in such a case as the present, a party was entitled, as a matter of right, to relieve as much under the one as under the other. The only difference between them was, not in his right to redress, but that in the action against the collector he had an enforceable remedy, whereas, in his petition to Congress, he had not an enforceable remedy.

The right to recover in the action against the collector was based upon a well-settled doctrine of the law of agency, that where money is illegally demanded and received by an agent, he cannot exonerate himself from personal responsibility by paying it over to his principal. It proceeded upon the assumption that the money sued for belonged to the party paying it, and not to the agent's principal. The object of the notice was merely to warn the collector that the party meant to hold him personally responsible for the money. There was no prescribed form in which it was to be given, nor was it necessary that it should be in writing.—*Ibid.* The action had its origin in the principles of the common law, and was governed by them. The grounds on which it was maintained are well stated by Mr. Justice Daniel, in the case of *Cary* v. *Curtis*, 3 How. R. 250. He said: "We all know that this action for money had and received is founded upon what the law terms an implied promise to pay what in good conscience the defendant is bound to pay to the plaintiff. It being in such a case the duty of the defendant to pay, the law imputes to him a promise to pay. This promise is always changed in the declaration, and must be so changed in order to maintain the action. It was upon this principle that the action for money had and received was sustained in the case of *Elliott* v. *Swartwout.* There money had been taken by the collector for duties which were not imposed. This money lawfully belonged to the plaintiff; it was the duty, therefore, of the collector to pay it back to him. The collector was not bound to pay it to the treasurer, for the law did not command this disposition of it. It did not belong to the United States, who had no right, therefore, to demand it of him, and could not have recovered it against him, in a suit, if he had paid it back to the true owner. It being the duty of the collector to return what he had unlawfully taken, the law implies on his part a promise to do so; and on this implied promise, arising or inferred

from a duty imposed upon him, the action was maintained. The protest and notice were to him of no further importance than to warn him to hold over, and to take away an excuse he might otherwise have had from payment to his principal. It was his duty, as the law then stood, not to pay over, but to pay back to the party from whom he had collected without legal authority, when warned that this party should look to him for reimbursement, and not to his principal." These remarks require no comment. They fully sustain the views which we have presented.

If, however, the party had not discovered the mistake, or having discovered it, had not made his protest or given notice to the collector, before the latter had paid the money to the treasurer, no action could have been maintained against the collector. But still the money, which had been collected for duties not imposed by law, and which, therefore, did not belong to the United States, could not have become the property of the United States by the mere payment of it to the treasurer. The position that such a payment would have produced such a result, cannot be sustained upon any principle of law, or of reason, or of justice, or of Christian morals. How could right have been done between the injured importer and the United States otherwise than by a payment of the money —the money of the importer which, by mistake, had fallen into the public treasury? In such a case existing between man and man there is no room for doubt as to the right of recovery; and where it occurred between the government and an individual, the obligation of the government to repay the money rested upon the same principle. There was not, and in the nature of things there could not have been one measure of justice between man and man, and another between the United States and an importer. The same rule of right and justice governed both cases. As against the United States, although there was no remedy in the ordinary courts of justice, yet an application could have been made by petition to the legislative department of the government; not for a favor, but for justice; not for a mere gratuity, but for a legal right. To retain money thus falling into the public treasury, was as unconscientious in the United States as it would have been in an individual who had received money under similar circumstances; and the legal duty or liability to repay it was the same in both.

Such was the law prior to the act of March 3 A. D. 1839.

(2.) We come now to inquire how far the question, whether the want of a protest is conclusive against the petitioner, is affected by the acts of 1839 and 1845.

The act of 1839 took away the right of action against the collector (*Cary* v. *Curtis*, 3 How. R. 236); but it did not take away, or in any manner affect or impair, the right of petition to the legislative department of the government; nor is there one syllable in that act which favors the idea that, in order to constitute a legal demand against the United States for repayment of money paid for duties not imposed by law, a protest is necessary.

The act of February 26, A. D. 1845, is as follows: "That nothing contained in the second section of the act" of March 3, A. D. 1839, "shall take away, or be construed to take away or impair the right of any person or persons who have paid or shall hereafter pay money, as and for duties, under protest, to any collector of the customs, or other person acting as such, in order to obtain goods, wares, or merchandise, imported by him or them, or on his or their account, which duties are not authorized or payable in part or in whole by law, to maintain any action at law against such collector, or other person acting as such, to ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial by jury touching the same, according to the due course of law. Nor shall anything contained in the second section of the act aforesaid, be construed to authorize the Secretary of the Treasury to refund any duties paid under protest; nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." (5 Stat. at Large, 727.)

Prior to the act of 1839, as we have seen, an action might have been maintained against a collector, provided there was a protest or notice. In that action the importer had the right to have "the legality and validity of" the "demand and payment of duties" ascertained and tried, and "to a trial by jury touching the same, according to the due course of law." This is undeniable. The only object of the notice was to warn the collector not to pay over, and that he would be held personally responsible for the money. The question of "the legality and validity" of the demand and payment of the duties did

not depend upon the notice or protest, but altogether upon other grounds. It is true, that the failure to make any objection to the payment, or, in other words, to make a protest, might have afforded *evidence* that the payment was *voluntary;* but, according to the principles of the common law which governed the action, the failure to protest could have had no other legal effect or operation upon the question of "the legality and validity" of the "demand and payment" of the duties. It would have had no effect whatever upon that question in a case where the payment was made under a mistake of fact; because such a payment was never regarded as *voluntary*, in the technical sense of that term. It is obvious, therefore, as we have already shown, that the protest was not *essential* to the validity of the demand against the United States, and was in no respect necessary to support the petition to the legislative department of the Government for a repayment of the money. The want of a protest could be used on the hearing of such petition for no other purpose than that for which it could be used upon the question of the legality and validity of the demand of the duties in the action against the collector, namely, as *evidence* that the payment was *voluntary.* We do not mean to be understood as embracing in these remarks the question, whether the failure to make objection to the payment of duties could in any case operate by way of an *estoppel* in *pais.* That question, whenever it shall arise, must depend upon its own principles, and cannot affect the correctness of the views which we have presented.

The question now to be considered is, did the act of 1845 produce any change in these respects? That act was, to some extent, a declaratory statute. The Supreme Court, in the case of *Cary* v. *Curtis*, had held that the act of 1839 took away the right of action against the collector; and the act of 1845 in substance declares that it was not the intention of Congress that the act of 1839 should have that effect. Its terms have already been quoted. As regards the action against the collector, the only essential change which the act of 1845 seems to have made, is to require that the protest shall be "in writing, and signed by the claimant, at or before the payment of the duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." There is nothing in that act which either expressly or by implication shows an intention to do more. The words used are plain, and we cannot intend that the legislature meant anything

more than it has expressed. We do not sit here to enact laws; that important power is entrusted exclusively to the legislative department of the government. It is our business to declare what the law is in the particular case which we are called upon to decide. In the construction of a statute, when words of a plain and definite import have been used, we are not at liberty to disregard them. Where such words are used, the only safe course is to adhere to the words, and to *collect* the intention of the legislature from them. It has been the experience of the most enlightened judges, that it is dangerous to depart from the plain and obvious meaning of the words of a statute. We are not at liberty to *presume* the intentions of the legislature, but we must *collect* them from the words of the statute; and we have nothing to do with the policy of the law. "This is the true sense," says Mr. Dwarris, "in which it is so often impressively repeated, that judges are not to be encouraged to direct their conduct 'by the crooked cord of discretion, but by the golden metwand of the law;' i. e. not to construe statutes by equity, but to collect the sense of the legislature by a sound interpretation of its language, according to reason and grammatical correctness."—1 Dwarris on Statutes, p. 702, 703. We are constrained, therefore, to say, that there is nothing in the act of 1845 which indicates an intention to give to the action against a collector a different legal effect from that which it had prior to the act of 1839. The failure to make a protest is no more conclusive against an importer now than it was before the passage of the act of 1845.

But it is supposed that some remarks made by Mr. Chief Justice Taney, in the case of *Lawrence* v. *Caswell*, (13 How. R. 496,) militate against these views. Those remarks are as follows: "But it is proper to say, in order that the opinion of the court may not be misunderstood, that when we speak of duties illegally exacted, the court mean to confine the opinion to cases like the present, in which the duty demanded was paid under protest, stating specially the ground of objection. Where no such protest is made, the duties are not illegally exacted in the legal sense of the term. For the law has confided to the Secretary of the Treasury the power of deciding, in the first instance, upon the amount of duties due on the importation. And if the party acquiesces, and does not by his protest appeal to the judicial tribunals, the duty paid is not legally exacted, but is paid in obedience to the decision

of the tribunal, to which the law has confided the power of deciding the question.

"Money is often paid under the decision of an inferior court, without appeal, upon the construction of a law which is afterwards, in some other case in a higher and superior court, determined to have been an erroneous construction. But money thus paid is not illegally exacted. Nor are duties illegally exacted where they are paid under the decision of the collector, sanctioned by the Secretary of the Treasury, and without appealing from that decision to the judicial tribunals by a proper and legal protest. Nor are they within the principle decided by the court in the case before us."

It must be conceded, that this language should be construed with reference to the case before the court, and considered in connection with the context. The case was, an action brought against a collector under the act of 1845. The context is as follows: "The duty of 100 *per cent. ad valorem* was chargeable on the quantity of brandy actually imported, and not on the contents stated in the invoices. This overcharge was therefore illegally exacted, and the defendants in error were entitled to recover back the amount." If this language had gone forth to the world unexplained, the learned Chief Justice might have been understood as announcing a principle which he did not mean to announce. Taken by itself, it in plain and unambiguous terms, declares, that where there is an overcharge of duty, the duty is *therefore* illegally exacted, and the party paying is entitled to recover back the amount. Nothing is said about a protest, or of what character the protest shall be. And yet this language was used in a case occurring under the act of 1845. Without an explanation, the opinion of the Supreme Court might have been understood to be, that a protest is not necessary to sustain such an action. In order, therefore, that the opinion of the court might not be misunderstood, the Chief Justice proceeds to give the explanation, which is to be found in the remarks which have been quoted. The whole object of it was more fully to declare the grounds on which an action, under the act of 1845, can be maintained.

Much stress was laid in the argument of this case upon this language: "Where no such protest is made, the duties are not illegally exacted in the legal sense of the term." It was urged with great earnestness, that it was used in its broadest and most general sense. But it is clear that it is not to be so un-

derstood. Its object was to explain the meaning of that "illegal exaction," which the learned judge had just said would entitle a party to recover back the money paid, in an action against the collector. He accordingly, in substance, says that to maintain such an action, the law requires a protest, stating specially the ground of objection, and in the sense of that law there can be no illegal exaction without such a protest. This was indubitably his meaning. He would justly be regarded as using language wholly extra-judicial, if he is to be understood in any other sense.

It was urged by the solicitor that the Chief Justice is to be understood as giving an exposition of the act of August 8, A. D. 1846. We think that there is no just ground for supposing that such was his intention. That act in no way related to the case which he was considering. It had not been referred to by counsel, nor was a reference to it necessary to the elucidation of his views. And besides, if the Supreme Court is to be understood as putting a construction upon the act of 1846, then it follows, that in the opinion of that court, no duties can be duties *illegally exacted* within the meaning of that act, unless they were paid under the protest required by the act of 1845. But many of the cases provided for in the second section of the act of 1846, originated long before the act of 1845, for it expressly embraces "such sums of money as have been illegally exacted * * * * since the third of March, eighteen hundred and thirty-three." Prior to the act of 1845, it was not usual in a protest to state the grounds of objection, nor was it necessary to do so. The construction, therefore, imputed to the Supreme Court, if adopted, would, in all probability, to a great extent, repeal the act of 1846.

The remarks which refer to the decision of the Secretary of the Treasury, are to be explained in the same way as those which we have already particularly noticed. And, moreover, it was not the intention of the Supreme Court to characterize the decision of the Secretary of the Treasury as a judicial decision; for no part of the judicial power, under the Constitution of the United States, can be conferred upon an executive officer. Every ministerial officer is obliged to make a decision in the first instance, in every case in which he is called upon to act.

If the act which he is required to do be *executive*, and not merely *ministerial* in its character, his decision is final as regards executive action, and no appeal lies from it to the courts,

nor can they revise his judgment. *Decatur* v. *Paulding*, 14 Peters' R. 497; *Bradshier* v. *Mason*, 6 How. R. 92. But it is not conclusive upon the rights of the party interested in the sense in which a judicial decision would be. He would still be entitled to appeal to Congress. 14 Peters' R. 522; *Reeside* v. *Walker*, 11 How. R. 272.

It was such a decision, on the part of the Secretary of the Treasury, to which the Chief Justice referred; and all that he meant to say was, that if the importer does not appeal from it to the judicial tribunals, in the manner prescribed by the act of 1845, he cannot maintain an action under that act against the collector; but in the sense of that act the duties are not illegally exacted.

That the Chief Justice is to be understood as we understand him, is rendered yet more manifest by what was said by him in the case of *Mason and Tullis* v. *Cane*, in the circuit court of Maryland. In that case there was a protest, but not such a protest as the act of 1845 requires, and the action failed on that ground. In delivering the opinion of the court the Chief Justice said: "It is unnecessary, therefore, to inquire whether the objections now made would have been valid if set forth in the protest. If improperly charged, it is, no doubt, yet in the power of the administrative department to do justice to the claimant. But no action can be maintained under the act of 1845." Now, it seems to us that if it was the opinion of this learned judge, that where there is no protest duties are not illegally exacted, understanding those terms in their largest and most comprehensive sense, but on the contrary, however improperly they be charged, or under whatever circumstances they be paid, if there be no protest, the party has no just claim or legal demand against the United States for re-payment, he could not have made the suggestion, that nevertheless, in such a case the administrative department would have it in its power to do justice to the claimant. Upon the hypothesis that his opinion goes to the extent contended for, he must have considered that justice had already been done according to law, and did not still remain to be done anywhere—that the claim had been adjudicated and settled by "the decision of the tribunal to which the law has confided the power of deciding the question," and the money paid without appeal to a higher tribunal. He surely did not suppose that the administrative department could give relief in a case so circumstanced.

But it is urged that the suit against the collector is substan-

tially a suit against the United States, and that, therefore, if a party fails to avail himself of that remedy, he can have no just claim against the United States. In the case of *Mason and Tullis* v. *Kane*, to which we have already referred, the following remarks were made by Mr. Chief Justice Taney: "For this suit, although in form against the collector, for doing an unlawful act, is in truth and substantially, a suit against the United States. The money is in the treasury, and must be paid from the treasury if the plaintiff recover. And as the United States cannot be sued and made defendants in a court of justice without their consent, they have an undoubted right to annex to the privilege of suing them any conditions which they deem proper. And in the exercise of this power they have granted this privilege in the form of a suit against the collector, where duties are supposed to be over-charged, upon condition that the claimant, when he pays the money, shall give a written notice that he regards the demand as illegal, and means to contest the right of the United States in a court of justice; and stating also, at the same time, distinctly, the specific grounds upon which he objects. This is the condition upon which he is permitted to sue the collector, and thus to appeal from the administrative to the judicial department of the government. It is a condition precedent." But it must be recollected that this was the very case in which the same distinguished judge said: "If improperly charged, it is, no doubt, yet in the power of the administrative department to do justice to the claimant." We have already shown, that the latter remarks are wholly inconsistent with the conclusion which has been deduced from the former. The consequence of a failure to make a proper protest is clearly and forcibly stated in the concluding sentence of the opinion of the court: "But no action can be maintained under the act of 1845."

The truth is, that in order to give to the act of 1845 the construction contended for on the part of the United States, it would be necessary to insert in it words which it does not contain. It seems to contemplate two modes of reimbursing to an importer money paid for duties not imposed by law—the one by the action of the Secretary of the Treasury, and the other by a suit against the collector. Both these modes, by the express terms of the act, require a protest in writing, signed by the claimant, stating the grounds of objection. But there is still another mode known to the law, and familiar in the practice of the government. It is by petition to the legis-

lative department of the government, and is not embraced by the act of 1845. In order to embrace it by that act words must be added thereto, or inserted therein, to the following effect: "Nor shall any money paid for duties, not imposed by law, be refunded by the United States to any claimant, unless, at or before the payment thereof, he make such a protest as is required by this act." To add words like these to a statute is far beyond the power of the judiciary. It falls exclusively within the province of the legislature. However much we might suppose that an enlightened public policy requires that such a provision should be made by law, we have no authority to make it. In the construction of a statute, we can only declare what it is, not what it ought to be.

The condition, then, of the petitioner, at the time of the passage of the act of Congress establishing this court was, that he had a just claim against the United States for money paid them by mistake for duties not imposed by law, but no enforceable remedy for its recovery. He had, by reason of the very mistake under which the payment was made, lost his remedy against the collector, and the Secretary of the Treasury had decided that his claim is "inadmissible under the laws." But his right to petition the legislative department of the government still remained in unimpaired vigor. His claim, as at its origin, still rested on an implied contract on the part of the United States to repay him the money. This money was his property, not theirs; and they were obliged, by the ties of natural justice and equity, to refund it; and, being so obliged, the law, according to principles universally acknowledged, (*Carey* v. *Curtis*, 3 How. R. 249,) had implied a promise on their part to repay it to him. This promise had not been performed. The money was still in the Treasury of the United States, and his right to demand its re-payment had not been waived or released. On the contrary, his claim still continued unsatisfied and undischarged. But the act to which we have referred makes it the duty of this court to "hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the Government of the United States." (10 Stat. at Large, p. 612.) This case comes within the very words of that act. It is emphatically one of the cases for which it was designed to provide. It is neither more nor less than a claim founded on an implied contract with the Government of the United States. It seems to us, therefore,

that if it be sustained by proof, the petitioner's right to relief is unquestionable.

Let an order be made authorizing the taking of testimony in this case.

COURT OF CLAIMS.

STURGES, BENNETT & Co. v. THE UNITED STATES: } SECOND OPINION.

SCARBURGH, J., *delivered the Opinion of the Court.*

In the years 1847, 1848, 1849, 1850, and 1851, the petitioners imported large quantities of brandy and whiskey in casks. The quantity entered and appearing on the invoices largely exceeded the quantity ascertained by the return of the gaugers, and under a regulation of the Treasury Department, then existing, duties were levied on the whole invoice quantity, without making any deduction for deficiencies shown by the returns of the gaugers. The several sums of money paid by the petitioners on such deficiencies amounted to the sum of two thousand and sixty-eight dollars.

When this court considered the question, whether testimony should be ordered in this case, it was assumed that on the entries the duties were paid as estimated or unascertained duties. We then held, that the regulations of the Treasury Department, under which duties were levied on the deficiencies shown by the returns of the gaugers, was unlawful, and that the petitioners are entitled to relief against the United States for the amount so levied.

It now appears, from the evidence, that much the larger portion of the brandy and whiskey imported by the petitioners was warehoused, and that the duties on the deficiencies in such importations were paid on the re-delivery of the liquors to them from the warehouses. The act of August 6, A. D. 1846, establishing the warehousing system, requires the goods warehoused "to be kept with due and reasonable care, at the

charge and risk of the owner, importer, consignee, or agent, and subject at all times to their order, *upon payment of the proper duties* and expenses, to be ascertained on due entry thereof, for warehousing, and to be secured by a bond of the owner, importer, or consignee, with surety or sureties to the satisfaction of the collector, in double the amount of the said duties, and in such form as the Secretary of the Treasury shall prescribe." (9 Stat. at Large, p. 53.) The condition of the bond prescribed by the Secretary of the Treasury, under this act, is as follows: "The condition of this obligation is such, that if the above bounden, (here insert the names of the principal and sureties,) or either of them, or either of their heirs, executors or administrators, shall, and do, at or before the end of one year, to be computed from the day on which the goods, wares, and merchandise entered for warehousing by or for the above bounden, (insert the name of the principal,) as imported in the ———, ——— master, from ———, as per entry, made at the port of ———, (insert the first port of entry,) and dated the —— day of ———, in the year aforesaid, shall have been deposited thereat in public store, well and truly pay, or cause to be paid, unto the collector of the customs for the port of ———, for the time being, the sum of —— $\frac{}{100}$ dollars, or the amount of the duties to be ascertained as due and owing on the aforesaid goods, wares, and merchandise, or shall otherwise secure, or cause the amount of said duties to be secured, conformably to law, then this obligation to be void; else to remain in full force and virtue." 1 Mayo's Synopsis, p. 331.

The regulation of the Treasury Department, which, during the whole period embraced by the importations made by the petitioners, required the collector to exact duties on the invoice quantity of liquors imported, without making any deduction for deficiencies which might appear by the returns of the gaugers, originated in a misconstruction of the tariff act of 1846, and was, therefore, invalid. *Marriott* v. *Brune*, 9 Howard's R. 619; *United States* v. *Southmayd*, Ibid., 637; *Lawrence* v. *Caswell*, 13 Howard's R. 488.

We have heretofore held in this case, that the act of February 26, A. D. 1845, (5 Stat. at Large, p. 727,) is not applicable to a case of unascertained duties; and in the case of *James Beatty's Executor* v. *The United States*, we held, that the want of a protest does not bar a party's claim against the United States for overpaid duties. See, also, the opinion

of this court in the cases of *William W. Spence and Andrew Reid* v. *The United States*, and *David Wood* v. *The United States*.

The question now presented is not precisely the same as that heretofore considered and decided in this case, or as the questions considered and decided in the cases of *Beatty* v. *The United States*, *Spence and Reid* v. *The United States*, and *Wood* v. *The United States*. We are now for the first time called upon to consider whether a party who, on the re-delivery to him of warehoused goods, pays without protest duties not imposed by law, but which are exacted by the collector, is entitled to relief against the United States.

Considering the question now presented under the aspect most unfavorable to the petitioners, it may be thus stated: Can money paid for duties not imposed by law, with a knowledge of all the facts, but under a mutual mistake of the law—both parties having the law in contemplation and in good faith meaning to conform to it, but acting under a misconstruction, which was ascertained by subsequent decisions of the Supreme Court of the United States—be recovered back? That money, thus paid, cannot be conscientiously retained, is a proposition which no honest mind can resist. Its retention can be excused only on the ground of positive law. There is no room for the slightest doubt that in this instance the money was paid under the influence of the mistake just described, and, to our minds, it is obvious that if there be no right of repetition, the law sanctions the doctrine, that the property of one man can be acquired by another, without the consent or fault of the owner. This cannot be. "It is an universal principle, founded in reason, that no one is entitled to have or retain that which *ex æquo et bono*, belongs to another: a principle found in every code, and circumscribed in its application only by positive rules, founded on the convenience and the necessities of mankind." Per Johnson, J., in *Lawrence* v. *Beaubien*, 2 Bailey's R. 648.

We do not mean to assert the broad proposition, that money paid under a mere mistake of the law can be recovered back. On the contrary, there can be no doubt that if it be paid in discharge of a debt contracted during infancy, or of a debt which would otherwise have been barred by the statute of limitations, or where any merely legal defence existed against a claim for the money *and* it may be honestly retained, no action will lie for its recovery. We entirely con-

cur in the doctrine laid down by Lord Mansfield on this point, "that if a man has actually paid what the law would not have compelled him to pay, but what in equity and good conscience he ought, he cannot recover it back." *Bize* v. *Dickason*, 1 T. R. 286. It is equally clear, too, that where money is paid on a fair and deliberate compromise of a doubted and doubtful right, both standing on equal terms and respectively taking their chances of the result, it cannot and ought not to be recovered back.

Nor do we mean to deny that where money is paid under a mere *ignorance* of the law, it cannot be recovered back. Whilst we do not very clearly perceive how the maxim *ignorantia juris non excusat*, can have any just application to such a case, still we do not find it necessary at present to question its applicability under proper restrictions. There can be no doubt that this maxim "is an indispensable rule of legal and social policy; it is that without which crime could not be punished, right asserted, or wrong redressed." (*Culbreath* v. *Culbreath*, 7 Georgia R. 70, 71,) and we surely would not weaken its force in its just and proper sense. But the very idea of *excuse* implies that there is something to be excused—that there is delinquency of some kind, and hence the maxim may justly be invoked where crime has been committed, a wrong done, a right withheld, or a duty neglected. But to our minds it is a plain perversion of both the language and the spirit of the maxim to apply it to one who has done no wrong, and withheld no right, and neglected no duty, but is himself the injured party, over whom an advantage in opposition to his legal rights and interest has been acquired; such an application of it offends the moral sense of every man, not only because it is a manifest perversion of language, but because it is palpably unjust. It does not seem to us that there is any motive of public policy which can justify it.

A distinction which, it is insisted, is both clear and practical, has been taken in some of the cases between *ignorance* and *mistake* of the law, and it has been suggested that much of the confusion in the books, and in the minds of professional men, upon this subject, is to be traced to the failure to recognize this distinction: "Ignorance," it is said, "implies passiveness; mistake implies action. *Ignorance* does not pretend to knowledge, but *mistake* assumes to know. *Ignorance* may be the result of laches, which is criminal; *mistake* argues diligence, which is commendable. Mere *ignorance* is no mis-

take, but a mistake always involves ignorance, but not that alone." And, moreover, "mere ignorance of law is not susceptible of proof. Proof cannot reach the convictions of the mind undeveloped in action, whereas a mistake of the law, developed in overt acts, is capable of proof like other facts." *Culbreath* v. *Culbreath*, 7 Georgia R. 70; *Lowndes* v. *Chisolm*, 2 McCord's Ch. R. 455: *Lawrence* v. *Beaubien*, 2 Bailey's R. 623; *Hopkins* v. *Mazyck*, 1 Hill's Ch. R. (S. C.) 242, 251; *Robinson* v. *City Council*, 2 Richardson's R. 317, 320.

In the case of *Hopkins* v. *Mazyck*, 1 Hill's Ch. R. (S. C.) 250, the court, supposing that the observations of the Chancellor were calculated to shake the rule in *Lowndes* v. *Chisolm*, and *Lawrence* v. *Beaubien*, thought it necessary to use the occasion to express their adherence to it. The learned judge who delivered the opinion of the court said: "*Lawrence* v. *Beaubien* was decided upon much consideration, and the more I have reflected upon it since, the more I am confirmed in its correctness; and I feel persuaded that all doubts about it proceeded from misapprehension of the principle on which it is founded. There is, as I understand it, a very obvious distinction between ignorance and mistake of law. Ignorance cannot be proved, (who can enter into the heart of man and ascertain how much knowledge dwells there?) and for that reason the courts cannot relieve against it. But not so in regard to a mistake in law. That is sometimes susceptible of proof. In relation to the general rules of property and common honesty, which every one of common understanding must necessarily be taught by their intercourse with society—as, that we have no right to the property of another, and that when, as in this case, one has parted from his property, either voluntary or for a good or valuable consideration, his dominion and power over it ceases—no one will obtain credit for the pretence of being mistaken. But who that has had any experience in the profession of the law, does not know that a whole life of intense application is insufficient to develop all its mysteries, and that the most untiring zeal and ardent pursuit must leave many of the secret recesses unexplored; and shall it be said that those whose pursuits in life are inconsistent with the study of the law shall understand its most subtle and intricate distinctions by intuition, and that at the price of their fortunes? I trust not. Mistakes as to matters of fact have always been regarded as relievable upon clear, full, and irrefragable proof; and mistakes in law ought to be upon the

same footing, when the proof is equally certain. Suppose a party claiming the benefit of a contract founded upon a mistake of law, should, when put to answer it, admit the fact and be base enough to insist on it—where is the conscience so seared against the claims of justice and common honesty, as not to revolt at it? Is not a mistake of this sort as susceptible of proof as a mistake in a matter of fact? Lawyers are the professional advisers of the community; they are looked up to as oracles in this department; and when, as in *Lawrence* v. *Beaubien*, their client is misled by them and makes a contract against his interest, what higher evidence can be wanted of the fact of mistake? Is it not as satisfactory as the admission of the party benefited by the contract? This is only one mode of proof, and I doubt not that there are others which would be satisfactory. But we regard the question as definitely settled, and have only thought it necessary to say this much to vindicate it from the doubts in which the opinion of the Chancellor was calculated to involve it." In the later case of *Robinson* v. *City Council*, 2 Richardson's R. 320, the learned judge who delivered the opinion of the court said: "An actual mistake of the law, made directly in reference to the law itself, is distinguishable from negative inattention. It is the difference between delusion and ignorance." The cases of *Lawrence* v. *Beaubien* and *Robinson* v. *City Council*, may be regarded as illustrations of the distinction between *mistake* and *ignorance* of law. The former was a *mistake* of law, and relief was granted; the latter was a case of *ignorance* of law, and relief was denied.

In the case of *Culbreath* v. *Culbreath*, 7 Georgia R. 70, the plaintiff, an administrator, made distribution of his intestate's estate amongst the defendants, to the exclusion of other distributees, with a knowledge of all the facts, but in *mistake* of the law. The object of the suit was to recover the over-payment. The learned judge who delivered the opinion of the court, said: "The difference [between *ignorance* and *mistake* of the law] may be well illustrated by the case made in this record. If the plaintiff (the administrator) had refused to pay the distributive share in the estate which he represented, to the children of his intestate's deceased sister, upon the ground that they were not entitled in law, that would have been a case of ignorance, and he would not be heard for a moment upon a plea that, being ignorant of the law, he is not liable to pay interest upon their money in his hands. But

the case is, that he was not only ignorant of their right in law, but believed that the defendants were entitled to their exclusion, and acted upon that belief by paying the money to them. The ignorance, in this case, of their right, and the belief in the right of the defendants, and action on that belief, constitute the mistake."

The doctrine, therefore, that there is a clear and practical distinction between *ignorance* and *mistake* of the law, not only seems to be founded in reason and justice, but is sustained by authority eminently entitled to respect. Assuming this distinction to be sound and correct, the declaration that where money is paid with a knowledge of the facts, but in *ignorance* of the law, it is a *gift* to the person who receives it, becomes not only intelligible, but consistent alike with truth and justice. The payment having been made, and no other assignable or provable motive for it existing, notwithstanding the maxim *nemo præsumitur donare*, still the conclusion is inevitable that it was a gift. But where money is paid under "an actual mistake of the law, made directly in reference to the law itself," 2 Richardson's R. 320, to say that the payment is *voluntary* and a *gift* to the party receiving it, is as untrue as it is unjust. To apply the maxim *volenti non fit injuria*, to such a case, is, to our minds, plainly absurd. Such a mistake, as was forcibly said by Butler, J., in *Robinson* v. *City Council*, "is distinguishable from negative inattention. It is the difference between delusion and ignorance." The idea that a gratuity was intended in such a case is preposterous. "The mind no more assents to the payment made under a mistake of the law, than if made under a mistake of the facts; the delusion is the same in both cases; in both alike the mind is influenced by false motives." *Northrop* v. *Graves*, 19 Conn. R. 554.

The Supreme Court of Errors of Connecticut have distinctly asserted that when money is paid by one under a mistake of his rights and his duty, and which he was under no legal or moral obligation to pay, and which the recipient has no right, in good conscience, to retain, it may be recovered back, whether such mistake be one of fact or of law; and this, they insist, may be done, both upon *Christian* morals and the common law." *Northrop* v. *Graves*, 19 Conn. R. 548. We concur in this doctrine. We believe that it is sustained by the principle of common law, and the adjudications most entitled to respect. We do not mean to say that all the cases

can be reconciled with each other. It must be conceded that there is, to some extent, a conflict of authority on this subject. We think, however, that most, if not all, of the citations which can be made against granting relief in cases of mistakes of the law, consist either of mere *dicta*, or of language used in cases which did not call for it, but which might have been decided upon other grounds. The cases are few where the principle held in the case of *Northrop* v. *Graves*, was necessarily involved and rejected by a direct and positive adjudication.

The principle of the case of *Northrop* v. *Graves*, has been reaffirmed in the case of *Stedwell* v. *Anderson*, 21 Conn. R. 139. In the latter case, it was applied to the conveyance of property, and, in thus applying it, the court stated it in this manner: "When property has been conveyed through mistake, by deed, which the parties never intended should be conveyed, which the grantor was under no legal or moral obligation to convey, and which the grantee, in good conscience, has no right to retain, a court of chancery will interfere and correct that mistake, whether it arose from a misapprehension of the facts, or of the legal operation of the deed."

The same principle was expressly held in the case of *Culbreath* v. *Culbreath*, 7 Georgia R. 64. In that case the court say: "If there is justice in the plaintiff's demand, and injustice or unconscientiousness in the defendant's withholding it, the action lies; or, to use more appropriate language, the law will compel him to pay. Now, when money is paid to another under a mistake as to the payer's legal obligation to pay, and the payee's legal right to receive it, and there is no consideration, moral, or honorary, or benevolent, between the parties *by the ties of natural justice*, the payer's right to recover it back is perfect, and the payee's obligation to refund it is also perfect —it becomes *a debt*. It is a case fully within the *ex æquo et bono* rule." Ibid., 68, 69.

In the case of *Lowndes* v. *Chisolm*, 2 McCord's Ch. R. 455, the question directly before the court, and the very point on which the case was decided, was, whether relief can be granted in cases of a mistake of the law. The doctrine was considered "well established, that relief is given where the mistake has been clearly one of law;" and it was thought that "the authorities relied on put the matter beyond all doubt, if, indeed, it could be doubted at this day."

In the case of *Lawrence* v. *Beaubien*, 2 Bailey's R. 623, this

doctrine was applied to the relief of a party from the obligations of a contract under seal. It was there held, that a mistake of law is a ground of relief from the obligations of such contract, where one party acquires nothing, and the other neither parts with any right, nor suffers any loss, and *ex æquo et bono* ought not to be binding; and that it makes no difference that the parties were fully and correctly informed of the *facts*, and the mistake as to the *law* was reciprocal. The court considered that there is no difference in principle between an action to recover back money paid, and one to enforce a contract founded upon a mistake of law; for, in general, the same principle which furnishes a protection from loss supplies, also, the remedy for a wrong. Ibid., 650. It will be recollected, that in the case of *Hopkins* v. *Mazyck*, 1 Hill's Ch. R. 242, the court supposing that the observations of the chancellor might shake the rule in the cases of *Lowndes* v. *Chisolm* and *Lawrence* v. *Beaubien*, made use of the occasion to express their adherence to it.

The same doctrine seems to be well established in Kentucky. *Fitzgerald* v. *Peck*, 4 Litt. R. 125; *Underwood* v. *Brockman*, 4 Dana's R. 309. In the latter case it was held, that if a man, without any other motive or consideration than an erroneous opinion respecting his legal rights and obligations, release a right, pay money, or undertake to do any act, he is entitled to relief equally as if he had acted under a mistake of fact, and for the same reason, namely, that the contract was not such as the parties, or one of them at least, really contemplated; "and such," the court say, "we understand to be the rational and consistent doctrine of the common law established in Kentucky."

In the case of *Moses* v. *Macfarlane*, 2 Burr's R. 1002, Lord Mansfield states the general principles of the action of *indebitatus assumpsit* for money had and received. "This kind of equitable action," he said, "to recover back money which ought not in justice to be kept, is *very beneficial*, and therefore *much encouraged*. It lies *only* for money which, *ex æquo et bono*, the defendant *ought* to refund: it does *not lie* for money paid by the plaintiff, which is claimed of him as *payable in point of honor and honesty*, although it *could not have been recovered* from him by any course of *law*, as in payment of a debt *barred by the statute of limitations* or *contracted during his infancy*, or to the extent of principal and *legal* interest upon an *usurious* contract, or for money *fairly lost at play*, because, in

all these cases, the defendant may *retain it with a safe conscience*, though by *positive* law he was *barred* from recovering. But it *lies* for money paid by *mistake*, or upon a consideration which happens to *fail*, or for money got through *imposition*, (express or implied,) or *extortion*, or *oppression*, or an *undue advantage* taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund* the money." Here Lord Mansfield broadly lays down the doctrine, that the action lies for money paid by *mistake*, without making any distinction between a mistake of *law* and a mistake of *fact*—"a suggestion," it has been said by a learned court, (*Northrop* v. *Graves*, 19 Conn. R. 556,) "of a much more recent date."

Chief Justice De Grey recognized the same principle in the case of *Farmer* v. *Arundel*, 2 Wm. Black. R. 825. He said: "When money is paid by one man to another, on a mistake either of fact or of law, or by deceit, this action will certainly lie. But the proposition is not universal, that whenever a man pays money which he is not bound to pay, he may, by this action, recover it back. Money due in point of honor or conscience, though a man is not compellable to pay it, yet, if paid, shall not be recovered back." Without deciding whether the money in that case could have been demanded by the defendant, the court considered it an honest debt, and relief was denied.

In the case of *Bize* v. *Dickason*, 1 T. R. 287, Lord Mansfield lays down the same doctrine. "But where," he said, "money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back in this kind of action." It was upon this ground, and this alone, that judgment was given for the plaintiff, and although Mr. Justice Gibbs, in *Brisbane* v. *Dacres*, 5 Taunt. R. 144, said: "I cannot think Lord Mansfield said 'mistake of law,'" yet no mistake of fact existed, and the only mistake in the case was a mistake of law. Lord Mansfield, therefore, must be regarded as referring only to a mistake of law, and the case of *Bize* v. *Dickason* is a direct authority for the principle, that where money is paid under a mistake of law, which there was no ground to claim in conscience, it may be recovered back. The point was necessarily involved in that case, and expressly decided by the court.

The case of *Bilvie* v. *Lumley*, 2 East. R. 469, is usually cited as a leading authority for the doctrine, that where money is paid with a knowledge of the facts, but under a mistake of the law, it cannot be recovered back. The authority of this case is questioned in the cases of *Culbreath* v. *Culbreath*, *Lawrence* v. *Beaubien*, and *Northrop* v. *Graves*. The report of it is certainly very unsatisfactory. The case was not argued, and it was disposed of in a manner which shows that it was entitled to but little respect as authority. The language of Lord Ellenborough is so loose and indefinite that it is impossible to determine upon what principle he meant to base the decision.

The case of *Brisbane* v. *Dacres*, 5 Taunt. R. 144, is also often cited as authority for this doctrine. Taking the principle of that case to be as it is stated by the reporter, it is not at all inconsistent with the decision in the case of *Northrop* v. *Graves*. The reporter thus states it: "If a person with knowledge of the fact, but under a mistake as to the law, pays over to another, claiming it as a right, money which he was not compellable to pay, he cannot, upon discovering what his legal right was, recover it back, *there being nothing against conscience in the other party's retaining it.*" It may well be insisted that no stronger principle is fairly deducible from the decision in that case. Mr. Justice Gibbs, who went further than either of his brethren against granting relief on the ground of a mistake of the law, said: "Lord Mansfield's *dictum* is, that money paid by mistake, which could not be claimed in conscience, might be recovered back. I have, however, considerable difficulty in saying that there was anything unconscientious in Admiral Dacres in requiring this money to be paid to him, or receiving it when it was paid." Chambre, J., was of the opinion that the plaintiff ought to recover, and sustained his views by an able and elaborate argument. He said: "The plaintiff had a right to it, and the defendant in conscience ought not to retain it. The rule is, that when he cannot in conscience retain it, he must refund it, if there is nothing illegal in the transaction: the case is different where there is an illegality." Heath, J., said: "It is very difficult to say that there is any evidence of ignorance of the law here." He put his decision on the ground of a voluntary acquiescence in the demand on the part of the plaintiff. Mansfield, C. J., said: "If it was against his conscience to retain this money, according to the doctrine of Lord Kenyon, an action might be maintained to recover it

back; but I do not see how the retaining of this is against his conscience. * * * This, then, being so, the admiral doing no more than all admirals do, is it against his conscience for him to retain it? I find nothing contrary to *æquum et bonum* to bring it within the case of *Moses* v. *Macfarlane*, in his retaining it. So far from its being contrary to *æquum et bonum*, I think it would be most contrary to *æquum et bonum* if he were obliged to pay it back." It was upon this ground that he denied the plaintiff's right to recover. It is apparent, therefore, that the decision in this case is not at all in conflict with that in the case of *Northrop* v. *Graves*.

In the case of *Hunt* v. *Rousmanier*, 8 Wheaton's R. 215, Marshall, C. J., said: "Although we do not find the naked principle, that relief may granted on account of ignorance of law, asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity." Again: "In this case the fact of mistake is placed beyond controversy. It is averred in the bill and admitted by the demurrer, that the powers of attorney were given by the said Rousmanier, and received by the said Hunt, under the belief that they were, and with the intention that they should create, a specific lien and security on the said vessels.

"We find no case which we think precisely in point, and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity is incapable of affording relief."

This case came again before the Supreme Court of the United States, and the decision then made was entirely consistent with the doctrine in the cases of *Northrop* v. *Graves*, and *Steadwell* v. *Anderson*. The court say: "If all other difficulties were out of the way, the equity of the general creditors to be paid their debts equally with the plaintiff would, we think, be sufficient to induce the court to leave the parties where the law has placed them." 1 Peters's R. 1, 17.

In the case of *Bank of the United States* v. *Daniel*, 12 Peters' R. 32, 55, 56, the court say: "That *mere* mistakes of law were not remediable is well established, as was declared by this court in *Hunt* v. *Rousmanier*, 1 Peters, 15; and we can only repeat what was there said, 'that whatever exceptions there may be to the rule, they will be found few in number and to have something peculiar in their character,' and to involve other elements of decision." There were other elements in

that case. (1) The court expressly say: "The equities of the parties being equal, to say the least, it cannot be against conscience for the appellants to retain their judgment;" and (2) the claim was barred by the statute of limitations. So far as this case goes, it rather sustains than is inconsistent with the doctrine of the case of *Northrop* v. *Graves*.

In the case of *Wheeler* v. *Smith*, 9 How. R. 55, a release from an heir-at-law to executors, made under a mistake of law and some undue influence, was set aside, though a large but inadequate consideration was paid. There was no fraudulent intent in the transaction on the part of the executors. "The influences operating upon the mind of the complainant induced him to sacrifice his interests. He did not act freely and with a proper understanding of his rights." The release was the result of a compromise, but the undue influence rendered it unconscientious for the executors to retain the benefit of it, and it was declared invalid.

One of the questions submitted to the supreme court for their decision in the case of *Elliott* v. *Swartwout*, 10 Peters' R. 137, was, whether a collector is personally liable in an action to recover back an excess of duties paid to him as collector, and by him in the regular or ordinary course of his duty paid into the treasury of the United States; he, the collector, acting in good faith, and under instructions from the Treasury Department, and no protest being made at the time of payment, or notice not to pay the money over, or intention to sue to recover back the amount given him. To this question the court very properly responded in the negative. But the learned judge who delivered the opinion of the court, went further, and said: "The case put in the question is one where no suit will lie at all. It is the case of a voluntary payment under a mistake of law, and the money paid over into the treasury; and if any redress is to be had, it must be by application to the favor of the government, and not on the ground of a legal right." It might be sufficient to say of these remarks, that they are mere *dicta*. That they are so is sufficiently obvious. But their propriety depends entirely upon the sense in which the learned judge understood the question which he was considering. It is plain from his subsequent remarks, that he considered the question as presenting a case analogous to that presented by Mr. Justice Gibbs, in *Brisbane* v. *Dacres*, 5 Taunt. R. 144, namely, where one man demands money of another, as matter of right, and that other, with a full knowledge of

the facts upon which the demand is founded, has paid a sum of money voluntarily. Such a case presents no question of mistake either of *law* or of *fact*, and the payment being *voluntary*, and, therefore, a *gift* to the party receiving it, the money might be honestly and conscientiously received and retained.

But not only was the money, in this case, paid for duties not imposed by law, under an actual mistake of the law, made directly with reference to the law itself, in a manner which renders it unconscientious for the United States to retain it; but it was paid under a *moral duress*, and for that reason cannot be regarded as voluntary. The parties did not stand on an equal footing. The property of the petitioners was in the possession of the collector, and the only means by which they could regain it, was either to pay the duties unlawfully demanded, or to tender the amount actually due and institute an action at law against the collector for its recovery. The horns of a dilemma were presented to them, and they were allowed perfect *freedom* of will to impale themselves on whichever they pleased. The alternative presented to them was but the choice of two evils, both of which were illegally imposed upon them. To say that a commercial man, the success of whose business depends upon the activity with which it is prosecuted, in submitting to an unlawful demand of duties under such circumstances, makes the payment *voluntarily* and *gives* the money to the United States, is, it seems to us, a gross perversion of both truth and justice. A payment cannot be a *gift* unless it be *voluntary*, and it cannot be *voluntary* unless it be made in the exercise of a *free* will. There is no freedom of volition in such a case. From the time of the leading case of *Astley* v. *Reynolds*, 2 Strange's R. 915, down to that of *Steele* v. *Williams*, 20 Eng. Law & Eq. R. 319, the authorities have been uniform and consistent, that such a payment is involuntary and the money may be recovered back.

In the case of *Astley* v. *Reynolds*, the plaintiff pawned his goods with the defendant, and, in order to regain possession of them, paid him usurious interest. He was allowed to recover the excess over the legal interest. "We think also," said the court, "that this is a payment by compulsion. The plaintiff might have such an immediate want of his goods that an action of trover would not do his business. Where the rule, *volenti non fit injuria*, is applied, it must be where the party had his freedom of exercising his will, which this man had not." 2 Strange's R. 916.

The case of —— v. *Pigott*, mentioned by Lord Kenyon in *Cartwright* v. *Rowley*, 2 Esp. N. P. C. 732, was an action brought to recover back money paid to the steward of a manor for producing at a trial some deeds and court rolls, for which he had charged extravagantly. The objection was taken that the money had been voluntarily paid, and so could not be recovered back again; but, it appearing that the party could not do without the deeds, so that the money was paid through necessity, and the urgency of the case, it was held to be recoverable. See also *Parker* v. *Great Western R. Co.*, 7 Mann. & Gr. R. 292.

In the case of *Close* v. *Phipps*, 7 Mann. & Gr. 586, the solicitor of a mortgagee, with a power of sale, refused to stop the sale, though the principal and interest of the debt, together with the defendant's costs, were tendered, unless the mortgager would pay expenses, with which she was not properly chargeable. The amount being paid under protest, it was allowed to be recovered back: "The money was obtained by what the law would call *duress*—as the plaintiff was obliged either to pay it or to suffer her estate to be sold, and incur the expense and risk of a bill in equity."

In the case of *Shaw* v. *Woodcock*, 7 Barn. & Cress. R. 73, Bayley, J., said: "If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other, unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment made by compulsion, and may be recovered back." In the same case, Holroyd, J., said: "Upon the question whether a payment be voluntary or not, the law is quite clear. If a party making the payment is obliged to pay, in order to obtain possession of things to which he is entitled, the money so paid is not a voluntary but a compulsory payment, and may be recovered back; and if the plaintiff below, therefore, was compelled to make the payment in question in order to get the policies of insurance, whether there was a pressing necessity or not, he has a right to recover it back."

In the case of *Boston and Sandwich Glass Co.* v. *City of Boston*, 4 Metcalfe R. 181, it was held, that payment of taxes to a collector, who has a tax-bill and warrant in the form prescribed by law, is to be regarded as a compulsory payment; and if such taxes were assessed without authority, they may be

recovered back in an action for money had and received, although the party made no protest before payment. See, also, *Amesbury Woollen and Cotton Man. Co.* v. *Inhabitants of Amesbury*, 17 Mass. R. 461, and *Preston* v. *City of Boston*, 12 Pick. 7. The rule arises from the power and authority placed in the hands of a collector of taxes, by virtue of his warrant, to levy directly upon the property or person of every individual whose name is borne on the tax-list, in default of payment of the taxes.

In the case of *Oates* v. *Hudson*, 6 Wels. H. & G. 346, 348, Parke, B., said: "In *Atlee* v. *Backhouse*, 3 M. & W. 633, it is correctly laid down, that in order to avoid a contract by reason of duress, it must be duress of a man's person, not of his goods; but that where a sum of money is paid simply to obtain possession of goods which are wrongfully obtained, that may be recovered back, for it is not a voluntary payment. *Pratt* v. *Vizard*, 5 B. Ad. 808, is an authority to the same effect."

In the case of *Ripley* v. *Gelston*, 9 Johns. R. 201, tonnage-money wrongfully demanded by the collector of the plaintiff as a condition of the clearance of his vessel, and paid in order to obtain the clearance, was recovered back of the collector. And so in the case of *Clinton* v. *Strong*, Ibid., 370, money paid by the plaintiff to a marshal for costs which were illegally demanded, in order to obtain possession of their vessel, was recovered back. The court say: "The payment of the costs could not be considered a voluntary act. They were exacted by the officer, *colore officii*, as a condition of the recovery of the property. It would lead to the grossest abuse to hold a payment made under such circumstances a voluntary payment, precluding the party from contesting it afterwards."

In the case of *Steele* v. *Williams*, 20 Eng. Law & Eq. 319, the plaintiff applied to the defendant, a parish clerk, for liberty to search the register-book of burials and baptisms. He told the defendant that he did not want certificates, but only to make extracts. The defendant said the charge would be the same whether he made extracts or had certificates. The plaintiff searched through four years and made twenty-five extracts, for which the defendant charged fees, which the plaintiff paid. Held, that the charge for extracts was illegal, and that the payment was not voluntary, so as to preclude the plaintiff from recovering back the money. Barons Platt and Martin concurred in the opinion, that when money is

paid under an illegal demand, *colore officii*, the payment can never be voluntary.

In the case of *Alston* v. *Durant*, 2 Strobhart's R. 257, it was held, that the payment of money exacted by a sheriff, *colore officii*, beyond his legal fees, as a condition of the delivery of the plaintiff's runaway slave, is not a voluntary payment, precluding the plaintiff from contesting it afterwards. The learned judge who delivered the opinion of the court, said: "It will appear hereafter that we attach much consequence to the fact that the party defendant here was a sheriff, and, as it appears to us, should be regarded as acting *colore officii*, and not *virtute officii*, in demanding and receiving a sum of money to which he was not entitled. In my opinion, however, there is both reason and authority for the principle, as applicable to persons in their private individual relations, that if undue advantage be taken by one of another's situation, the first having property of the last in his possession which he illegally retains and refuses to deliver unless a sum of money be paid to him, to which he has no legal or conscientious right, this is a fraud, a species of compulsion, and the money ought to be recoverable." Ibid., 260. Upon a review of the authorities he came to the following conclusion: "I think, therefore, there is warrant enough, upon authority, to say that where one man, in any capacity, avails himself of the possession of another's goods, to wring from that other an unlawful payment of money as the condition, and the only one, upon which the goods will be restored, such payment shall not be voluntary in the eye of the law." Ibid., p. 264.

In further commenting on that case, the learned judge said: "For all essential results, here was a public officer acting as a judge in his own case, with power to enforce his judgment, or else to drive the adverse party to a much greater sacrifice, it may be, and thus wresting from the citizen a sum of money which *ex æquo et bono* he could neither receive nor retain. There must be a clear difference between the case of a public officer withholding, of his own mere motion, the rights of a private person, and the demand of one private citizen against another, with no power beyond the ordinary modes of legal proceeding to vest and enforce it, acquiesced in though unlawful." Ibid., 265.

Other cases to the same effect might be cited, but these are deemed sufficient to sustain the declaration with which we set out, that from the time of the leading case of *Astley* v. *Reynolds*

down to that of *Steele* v. *Williams*, the authorities have uniformly and consistently sustained the doctrine, that a payment made under circumstances like those of the present case, is compulsory, and the money may be recovered back.

It seems to us, therefore, that the petitioners are entitled to relief.

We shall report to Congress a bill in favor of the petitioners for the sum of two thousand and sixty-eight dollars.

APPENDIX.

Contents.

APPENDIX.

THE COURT OF CLAIMS.

ITS ORIGIN AND PROGRESS.

THE evils and abuses of Private Bill Legislation have grown into a "pernicious enormity." The subject, in England, has, of late years, received some portion of the attention it deserves.* *We* have barely begun to consider it.

During the first ten years of the present reign, the number of local, personal and private acts of Parliament passed amounted to 2,200, or nearly double the number of the public general acts of

* "The evils of the system of legislation by Private Bills have been often pointed ont—bad as the principle is by which the law is allowed to be warped and fashioned on such a variety of special occasions to suit the purposes of private individuals, the abuses which accompany this anomalous procedure afford matter even for still more serious consideration. Were the precautions imposed by the Legislature in the case of private statutes sufficient to prevent any serious infraction of the great principle of *equal laws* for all,—the mode in which the precautionary inquiries are at present conducted must go far to justify the complaint that our Private Bill system does tend to defeat their object, to cause needless cost and needless trammels upon legitimate enterprise, and to give at the same time too much countenance to the notion that undue influence, personal bias, and even still worse agents, are brought to bear on those who have to make the investigation.

"The evils which immediately arise out of our Private Bill system are not only those of a needless waste of public time, hindering the urgent affairs of the commonwealth, and a reckless expenditure of private property, serving at once as an impediment to private enterprise and a protection to unfair monopolies; bnt the system itself tends to confound the functions of the Legislature with those pertaining only to the judicial office, and directly to encourage jobbing, corruption, and malpractice in those whose upright bearing is of national moment."—*English Mag.*

the same period; and the English statute book now contains the formidable number of 26,297 local, personal and private acts, which control, qualify, or dispense with the general law of the land.

In this country, the evil is not confined to the State legislative bodies, where local, personal and private interests are, from the nature of our system, more especially provided for, but has invaded Congress, with a force accumulating year by year. To be convinced of this, one need but glance through the Statutes at Large, in their already ten ponderous volumes,* and note the proportion of their respective contents made up of private acts. Till the practice of legislating for every occasion by private bill is abated, in vain will be all attempts to consolidate the statute law. In vain is the doctrine inculcated, that we live under equal laws, if immunities are still to be procured and privileges obtained, by means of an endless variety of private statutes.

Of private acts of Congress, the large proportion are of a purely personal nature, and of that portion a great share is devoted to making provision, in one shape or another, for the public creditor. Indeed, private claimants upon the general government are "legion."† They have accumulated and are constantly

*A careful and elaborate publication made its appearance, in 1853, in three volumes folio—a public document ordered by the House, in which is set down, in alphabetical order, reference by way of minute index to every private claim presented to, or passed upon by the House of Representatives, since the foundation of the government.

†Every private claim upon the government belongs to one or the other of two divisions, and the classification is practical as well as natural. The one embraces all demands founded in positive obligation, the other all claims for reward, benevolence or gratuity. Of the former, are all demands founded in statute or legal right; of the latter, all claims, for example, for pensions, or as compensation for extraordinary services, for contributions to promote an evident public good, or gifts for favors rendered the State. All these, of both classes, grow out of the relations between the general government and the people, or between the people whom that government represents and those outside, individuals or nations. Those of class one exist in *positive*, those of class two in *rational* law.

If our division is just, and of this the reader will judge, what writers on this subject sometimes rather loosely denominate "equities" and the claims of the above second class, are synonymous. They constitute, undoubtedly, a large porton, if not a majority, of the claims brought before our national legislature, and are of the greatest importance; but it seems to us the writers in question do not clearly distinguish as to the term "equities," used in that connection, and are led thereby into some confusion of illustration if not of ideas. They cannot mean, surely, equities as contrasted with legalities, or

accumulating, by reason principally of the system, or rather want of system, up to a very recent date exclusively pursued by government, in the examination and liquidation of claims upon its treasury. The governments of Europe pay their debts in a different manner; one much more natural, convenient and economical. In France, where administration is brought to that

equity in our technical sense, for that follows the common law, and is applied to its correction or qualification. It is a popular fallacy that equity and law are opposed; the former is assistant to the latter, or acts concurrently with it. A parity of law and reason governs both law and equity; their essential difference consists in the different modes of administering actual law, as to the mode of proof, the method of trial and the measure of relief. Nor does the word equity, employed in a general sense, according to Johnson and Webster rather than Coke and Blackstone, sanction this use of the term. It there stands for justice, right, impartiality, and, so employed, is too indefinite.

Whatever name we give to claims of the second class, they clearly *cannot* be made a subject of legal investigation, nor are they susceptible of the application to them of rules of evidence, except when they are incorporated in and become creatures of statute law. They are then turned over to our first class.

Now, an attempt to refer to a court, or outside board, the consideration of claims for rewards, benevolences or gratuities from government, could only end in miscarriage. From their nature it would be absurd to delegate action on such claims, and execute by proxy what is morally proper, becoming, suitable, but not obligatory. Government can have no grand almoner. Action by substitute or proxy, out of Congress, *e. g.*, upon the measure of national gratitude for public services, would convey a slight rather than honor and respect. The sovereign, *i. e.*, the people, should attend to that themselves.

The Act of the 24th February, 1855, commits to the Court of Claims all claims upon which Congress may pass by proxy, to wit, those of the above first class—demands obligatory upon the general government by law or statute. They embrace, according to the Act, (1.) All claims founded in contract express or implied; (2.) Those growing out of Acts of Congress; (3.) Claims founded upon the regulations of any Department, by way of appeal from its decisions; and (4.) Claims specially committed to the court by Congress

The subject of "contracts express or implied" presents an immense field for judicial action. It involves the consideration, at one time or another, by the judges, of almost every species of law extant, so various must necessarily be the origin of cases upon which the court will have to act. The judges are not restricted in this respect, and to arrive at the sense and interpretation of the various codes and systems upon which contracts are founded, the law of the proper forum, be it the common or civil law as modified in different States and countries here and abroad, or some other system, as well as law public and international, will be referred to and relied upon. Wherever the State fails to give the citizen due protection, or to indemnify him for direct loss in the public service, or from the public enemy, a claim reasonably and legally arises for violation of an implied contract, or for damages.

To decide, in every case, according to the spirit of the rule, not the strictness of the letter, will require, also, the fullest and broadest exercise of that equity "by which positive law is construed and rational law is made." The Court of Claims, in this way, cannot but prove a court of equity, if it does not otherwise exercise equitable powers. It is not restricted by the Act to any existing code of law or system of practice.

perfect system, which has preserved the State amidst revolutions and *coups d'etat* rapidly succeeding each other, government submits, in the *cour des comptes*,* to the law by which, in the ordinary tribunals, the transactions of individnals are regulated. In England, the public claimant is sent by Parliament, or the Chancellor, as the case may be, to the judicial arbiter, whose judgment between the sovereign and subject is final, and duly executed. In no civilized nation but this, is government, as to its dealings with the citizen, above the law, but yields assent, if not obedience to it, as pronounced by the judgment of some court.†

* The reader will find a full account of the organization and attributes of the *cour des comptes*, in Baron Gerando's "Institutes du Droit Administratif Français, ou Élémens Du Code Administratif."

See also, "Report" of H. S. Sanford, late *Chargé d'Affaires* of the United States at Paris.—SEN. EX. DOC., *p.* 158:—

"There exists, also, another organization, at once administrative and judicial, the study of which offers peculiar interest: the *administration contentieuse* (or of disputed claims). This division is the fundamental principle of the entire judicial and administrative institutions of France. The judge is liable to criminal punishment when he does not refuse to sit in judgment on administrative cases.

"The acts of the administration, however enlightened he the functionaries who execute them, and the councils by whom they have been previously discussed, come into collision, notwithstanding, in many cases, with the views and interests of the public.

"Justice, equity, and prudence required that a means should be provided for receiving their claims on the subject. These claims may be of two kinds: In the first instance, of citizens complaining that the acts of the administration have wounded their interests and blasted their hopes; and secondly, that they have infringed on their rights.

"In the former case, they apply to the government in the name of equity, and await the reform of the act hurtful to their interests, by an act of benevolence on its part.

"In the second case, it is in the name of the law they speak, and justice which they claim.

"Claims of this second kind are followed up by the means of which we are treating; a real lawsuit takes place between the government representing society, or the general interest, on the one hand, and the individual whose rights are attacked, on the other.

"The principles adopted in France relative to the separation of the different powers, do not allow the matter to be brought before the judicial authorities; but it has been imagined that the authority called upon to judge in the question ought not to belong to the hierarchy of the agent from whence proceeded the incriminating act, and that the decision should have the same force as the judgments of the tribunals. The members of this tribunal may then be considered, and in general are so, as administrative tribunals.

"These tribunals are: The councils of prefecture, which decide in most cases of administrative discussion, and against whose decision an appeal can be made to the Council of State; and in matters of finance to the *cour des comptes* (court of accounts)."

† It has been sometimes thought that this is a serious defect in the organization of the judicial department of the National Government. It is not, however, an objection to the Constitution itself; but it lies, if at all, against Congress for not having provided (as it is clearly within their constitutional authority to do) an adequate remedy for all private grievances of this sort in the Congress of the United States. In this respect there is a marked contrast between the actual right and practice of redress in the National Government, as well as in most of the State governments, and the right and practice maintained under the British Constitution. In England, if any person has, in point of property, a just demand upon the King, he may petition him in his court of chancery (by what is called a petition of right), where the chancellor will administer right, theoretically, as a matter of grace, and not upon compulsion; but in fact, as a matter of constitutional duty. No such judicial proceeding is recognized as existing in any

The private personal claims upon the United States, which occupy so much of the time of Congress, are of the past as well as the present. For years after our life as a nation began, we were in fact insolvent, and unable to discharge adequately, if at all, the public obligations incurred by Revolutionary efforts and their successful result. Delay to pay has the moral tendency to beget, if not repudiation, a disposition or hankering for something quite like it. Witness the illustration of this in the pending treatment of thousands of claims, not less just and urgent because of nearly the same age with our Declaration of Independence. And we can no longer put in the plea of national poverty for national neglect or ingratitude.

It is not a purpose of this paper to recapitulate circumstances appertaining habitually to congressional action upon private claims, which are familiar to the public, or to show that Congress has not proved a fit or competent judicature of such claims.*

State of this Union, as matter of constitutional right, to enforce any claim or debt against a State. In the few cases in which it exists it is matter of legislative enactment. Congress have never yet acted on the subject, so as to give judicial redress for any non-fulfilment of contracts by the National Government. Cases of the most cruel hardship and intolerable delay have already occurred, in which meritorious creditors have been reduced to grievous suffering, and sometimes to absolute ruin, by the tardiness of a justice which has been yielded only after the humble supplications of many years before the Legislature. One can scarcely refrain from uniting in the suggestion of a learned commentator, that in this regard the constitutions both of the National and State Governments stand in need of some reform to quicken the legislative action in the administration of justice, and that some mode ought to be provided by which a pecuniary right against a State, or against the United States, might be ascertained, and established by the judicial sentence of some court; and when so ascertained and established the payment might be enforced from the public Treasury by an absolute appropriation. Surely it can afford no pleasant source of reflection to an American citizen, proud of his rights and privileges, that in a monarchy the judiciary is clothed with ample powers to give redress to the humblest subject in a matter of private contract or property against the Crown; and that in a republic there is an utter denial of justice in such cases to any citizen through the instrumentality of any judicial process. He may complain; but he cannot compel a hearing. The republic enjoys a despotic sovereignty to act, or refuse, as it may please; and is placed beyond the reach of law. The monarch bows to the law, and is compelled to yield his prerogative at the footstool of justice.—*Story's Comm. on the Constitution.*

* "While the most trifling question arising between parties on the state of disputed facts, or the application of known laws to these facts, must in this, and, indeed, in every country enjoying the blessings of regular government, come before tribunals qualified by the learning, skill, and experience of the Judges composing them, to deal with such comparatively easy questions, the

It is in place, however, to remark, that attention to private claims has occupied altogether too much of the time of Congress, and if properly attended to, would have taken up all its time. The system answered better when our population was only a few millions.

It has been the most expensive method possible of attention to that class of business, both as to the public time and money. Institute a court or tribunal specially for the duty, on the most expensive scale, with its attendant salaries and outlay, in every State of the Union; the aggregate expense would not come to a tithe as much. Congress, for reasons the most obvious, has never given, and could never give, private claims patient or adequate investigation; they are too numerous, intricate and difficult, and frequently too insignificant, although perhaps of the last importance to those who hold them. Claims passed have been too often the least deserving, and their success due to tact and good fortune in the management of them, or to the friend in Congress, rather than their intrinsic merits.

The evidence, as a general thing, was taken in committee, without any of the forms which insure accuracy and guard against fraud; indeed, almost at hap-hazard. Congress knew little of what transpired in the committee-room, and was content. Evidence informally taken, and without oath, cannot be regarded as reasonably sufficient or safe, in the due investigation of any claim of the least importance.

Our whole system of *dis*-satisfying the public creditor, has been for years in disrepute. Public opinion called loudly for a

oftentimes much more important and much more difficult questions raised by the consideration of Private Bills only come before Committees of both Houses, on which professional men hardly ever sit, and which are wholly composed of persons who can have no experience to guide them, inasmuch as each can only sit on one or two cases in the course of a Session.

"That the individual responsibility of the Judges who compose the ordinary tribunals of this and all well-governed States, affords a security eminently necessary for enforcing the due administration of justice, and for giving the community full confidence in their decisions,—a security held to be necessary, although it is much more difficult for a judge, dealing with the known and fixed rules of the Law, to swerve from his duty, and pervert that law to the purposes of injustice, than it is for men who are called upon to decide on the provisions of a Bill professedly creating exceptions to the Law for particular purposes, and arbitrarily dealing with rights according to no known or fixed rules or principles whatsoever."—*Report to House of Lords in* 1846.

substitute. Congress, at last, complied with the demand by the Act creating the Court of Claims.* The desire to know how far

* "I propose to look at the reasons leading to the enactment of this law. They were manifold. From the foundation of the Government, Congress had been besieged by private claimants. The interpretation put upon the old judiciary act of 1789, that the United States could not be made defendant in any suit, and the failure of Congress to form a tribunal that could take cognizance of a particular class of cases, left to persons who deemed that they had just claims against the Government no other means of redress than that of petitioning Congress. There were meritorious claims, some of them falling within, and some outside of, particular statutes, for which satisfaction could not be obtained, save by an appeal to the justice or generosity of the Government.

"With the lapse of time, the applications multiplied so rapidly that the two Houses of Congress felt themselves called on so to shape their rules as to allot certain days for the consideration of private claims. The committees of the two Houses found it impossible to carefully and thoroughly investigate and examine them. Long and oppressive delays ensued in the disposition of many of them. The parties who were interested grew old, and died sick and weary at heart, disappointed in their hopes, broken in their fortunes, and even painfully distrustful of the integrity and magnanimity of the Government.

"Others, in the hope of expediting the settlement of their claims, employed agents and counsel to electioneer with members, relying more upon their yielding to personal solicitations than to the suggestions of high public duty. Then followed, as a necessary consequence, the fabrication of claims founded in fraud, and to be pushed through by the most unscrupulous means. The annual flocking here of hordes of claim agents, their constant and pertinacious intercession with members for the success of this or that claim, ended, as it could not otherwise have done, in creating suspicions against the integrity and fairness of members themselves. Imputations were cast upon them, and the scrupulous legislator, nice of his personal honor, grew restive under them. Even if no imputations had been made, the members were constantly subjected to annoyance by the applicants themselves or their agents.

"In addition to all these influences, the conviction on the minds of many members that gross injustice and irreparable wrong had been inflicted in many cases, by the delay and failure of Congress to act on them, forced them to devise some plan by which the evil would be greatly diminished, or wholly avoided in the future. A majority of both Houses became satisfied that some other instrumentality for the investigation and settlement of claims should be resorted to. It was known that fraudulent claims had been so adroitly presented, as to pass through and receive the sanction of the most careful committees, and that in some cases the same claim had been *twice* paid. Besides this, the *ex parte* mode of investigation adopted by your committees was felt to be neither just nor equitable, nor calculated to elicit truth. These considerations induced the last Congress to pass a bill to establish the Court of Claims."—*From Speech of Hon Percy Walker, of Ala., in House of Representatives, April* 18, 1856.

"I labored faithfully, and with more zeal I fear than was acceptable to the House, when the bills that have just been referred were brought into the House, to have them referred to the Committee of the Whole House, and placed on the Private Calendar—and by that means give effect to the decisions of the Court of Claims—at least to treat those decisions with as much respect as belongs to the decisions of any of the committees of the House. The country looked to that court, when it was established, as a great measure of justice and relief to honest private claimants. If there was any one act not mixed up with poli-

the court has, thus far, answered the purpose, is very natural and very general. It exists particularly among those into whose hands this volume will most probably fall.

The public judgment, there is ample reason to assert, is satisfied with the court, so far as its own action is concerned. It has given satisfaction by laborious attention to its duties;* the ability, character and tendency of its decisions. As a tribunal, at once high-toned, not litigious, guided by the equity of the law rather than its letter, reasonably speedy, cheap† and convenient in the

tics, on the part of the last Congress, which the country approved more than another, it was the establishment of that court; and the reason why the country approved it was, because it knew that year after year, claimants came here —honest creditors of the Government—and begged for justice; but that, owing to the pressure of the public business, or to the bad system of doing business in Congress, they were put off, delayed, deferred, and disappointed, from day to day, from month to month, from year to year, and from one Congress to another, to an extent which in many cases operated even worse than a prompt denial of justice.

"And when the people heard that a tribunal was established by Congress to examine their claims—to hear and report upon them, to communicate to Congress the ascertained facts in regard to them, and the law that governed them, they supposed it was to give some relief—it was to operate as a measure of justice—it was to shorten, to some extent, the long road which they had travelled, and the prolonged probation upon which they had been kept theretofore, when they came to ask justice and judgment from this their own dilatory Government."—*From Speech of Hon. Mr. Haven, in the House, May* 16, 1856.

* The court assembled for the first time in July, 1855, and completed its organization. After careful attention to its rules and system of practice, the appointment and qualification of its officers, and other matters requiring attention at the outset, the judges separated to resume their labors in October then next. The court on October 17, 1855, reassembled and entered at once upon its proper judicial labors. From that date until Congress closed its session in August last, the court continued its term *en permanence* without vacation. It resumes again in November next.

† It is almost an axiom that justice is neither swift nor cheap. The summary proceedings before a Turkish cadi are an exception. But in courts, where deliberation and method are supposed to prevail, the process is always attended with expense. As a general thing, cheapen justice and you weaken its administration. The Court of Claims, however, is not among tribunals known as expensive. As to the expenses which attend multifarious litigation, the Court of Claims is far behind other federal courts, as well as State courts generally of the higher grades. This is due to the elimination from its practice of technical pleading, litigation, interlocutory business and appeals. A more simple, as well as inexpensive system of practice could not well be devised. A certain amount of printing is required by the rules; only of the original petition and brief in each case before the court, a mere bagatelle as to expense, and yet a great facility in the way of a thorough examination by the Bench. On the score of outlay even, it is questionable whether printing is not the most economical mode of preparing papers of which numerous copies are required. It has been adopted with advantage in many of our higher courts.

Remuneration to counsel and the outlay for depositions are the chief sources

administration of its justice, it has already merited and received the title of the " People's Court."

But is public opinion equally content with the course of Congress, since the organization of the court, with reference to its reports—or rather *judgments ?**

of expense. As to the former, every claimant will, of course, procure counsel in proportion to the results at stake in his case, but not to the same extent, comparatively, as when there is an opponent on the record watchful to take advantage in every way. It would tax the ingenuity of any legislature to devise a cheaper method of collecting testimony than that by means of commissioners, as authorized by the Act of Congress and organized in the court rules. Trial upon evidence taken *viva voce*, for obvious reasons, is here out of the question. That is used to advantage, as regards outlay, only as to issues where the witnesses are at hand or easily procured. Even in trials by jury the commission is resorted to, frequently from necessity, to save expense. In courts of equity the system of taking testimony out of court has always prevailed. In the new court, where witnesses in cases of importance are numerous and scattered, the method will work well, and prove to claimants economical in many respects. Fees for travel of witnesses are saved, as the court has already appointed permanent commissioners at important points throughout the country; can appoint special commissioners elsewhere if required, and allows judges and clerks of all courts of record to take depositions in counties where there is no officer permanently authorized to act for the court. Thus, no claimant can find it difficult to procure a commissioner when one is wanted.

The fees allowed for taking depositions are not large; $3 a day or session; 20 cents for every 100 words, or folio, of testimony reduced to writing and certified by the officer; and ten cents for swearing a witness. Taking every acknowledgment, 25 cents. The fee for each session was fixed, at the outset, at $5, but was reduced by the revised rules. Now these charges are moderate; the number of sessions depending, as in the familiar case of reference under our New York practice, as a general thing, altogether upon the convenience of parties and their legal advisers. But the attendance of claimant or counsel is not essential before the commissioner, as the testimony may be taken on interrogatories. If competent and honest, and as to this suitors for their own sakes will provide by careful scrutiny beforehand, the commissioner will see to it, in the absence of counsel, that witnesses speak the truth, the whole truth and nothing but the truth, equally for claimant and government. Another consideration is deserving of thought in this estimate of probable expensiveness. In a large class of cases, and in nearly all these which have been already before departments or committees of Congress, the evidence will be documentary, and the intervention of a commissioner only slightly, if at all, needed. In such cases, the testimony passes for use from the department, or its usual place of deposit, directly to the clerk's office of the court itself.

* Pending the debate in the House of Representatives, as to the disposition to be made *there* of Reports from the Court under the Act of Congress, a communication appeared in the *Washington Union*, from which the following are extracts:—

"The discussion of the House to-day involves the question as to the proper disposition of the cases reported to Congress by the Court of Claims. It is important that the first step taken should be in the right direction, for the precedent of to-day becomes the law of to-morrow. * * * To this tribunal has been assigned a portion of that judicial power which, by the 3d section, 1st article, is vested 'in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.' Congress, though late, thus freed itself from the imputation which Judge Story, and other legal commentators, alleged existed against

The Court of Claims has, *proprio motu*, taken its position under the Act of Congress as a constitutional court,* in which the judicial power conferred by the Constitution on the general government can be deposited; as part of the national judiciary and not a legislative tribunal merely.†

the government, that while in the exercise of its functions it was enabled to contract and to compel the enforcement of its own rights against the citizen, yet that the citizen was left with no right against the government in the same transactions, except the right to petition Congress —a body which, from its very organization, is unfit for that attentive investigation which courts of justice are so well calculated to afford. * * * The report of the court should be received as a solemn determination of a judicial tribunal sworn to support the constitution and laws of the United States, and fairly to determine such controversies as are within their jurisdiction, between the government and the citizen. * * * * * * * * *

"When the court has made the report of cases provided for by the act of its organization, it would seem that it was certainly entitled to at least as much confidence as if a similar report had come from the Committee of Claims. According to parliamentary practice, a report from a committee, without special cause assigned, is never sent back to another special or standing committee, but is immediately referred to the Committee of the Whole House, where it takes its place on the calendar. If Congress had not believed that the interest of the government, as well as the claimants, could be better investigated and more accurately determined by the court than by the Committee of Claims, it would never have incurred the expense of establishing and maintaining it. It is supposed that in Committee of the Whole the House cannot be accurately informed so as to vote understandingly. This would seem to be erroneous; for, as all the proceedings in each case—the judgment, the facts, and the law upon which it is predicated, as well as the argument of the solicitor and counsel—will all be printed and laid on the desk of each member, no question could arise which could not be answered by the documents themselves. If the idea prevails that each case should be investigated *de novo* by the Committee of Claims, and again reported on by them, it would seem to follow that the court is no relief to the business of Congress, and only serves to impose additional expense and delay upon the claimant. I have thus hastily thrown out the impression made upon my mind by the debate in the House which has been adjourned over for to-morrow.

"WASHINGTON, March 6, 1856."

* "The gentleman from Pennsylvania, [Mr JONES,] who has insisted that these reports should be referred to the Committee of Claims, and those who think with him, have contended that the proceedings of this court are merely *advisory* or *recommendatory;* that the functions performed by it are simply those of a committee, and partake not of the authority or dignity of a court. I join issue with him as to this. The history of the act in the Senate, in which body the bill originated, is important in the settlement of this issue. When the bill was first introduced into the Senate, it provided for what was called a *board of commissioners*, with limited powers, confined to mere inquiry and investigation, to record and report the facts ascertained by them to the two Houses. This was objected to, and it was urged that, instead of passing the bill in its then frame and title, they should change it so as to establish a *court*, to consist of three judges, to be appointed by the Executive, by and with the advice and consent of the Senate, to hold their office during good behavior. These counsels prevailed. The bill, as thus shaped, passed the Senate. It came into this House. There was no debate here. It was referred, as it came from the Senate, to one of the committees, and reported back to the House and received its sanction."—*From Hon. Mr. Walker's Speech.*

† Any tribunal which Congress may create with other powers than those named in the Constitution, extending to cases not included in the terms of the Constitution, proceeds from the sovereign will and pleasure of Congress alone, and derives, and can derive no authority whatever from any other source than Congress.

American Insurance Company v. *Canter*, 1 Peters' Sup. C. R., 445 and 446. Speaking of the territorial courts, the Supreme Court, *per* Marshall, Chief Justice, says:

"These courts are not constitutional courts, in which the judicial power conferred by the

It remains yet to be seen if Congress will recognize this construction by the court of its own powers. Action on the subject in the Senate and House, during the late session, was not by any means decisive one way or the other.* The court, in accord-

Constitution on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress in the exercise of those general powers which that body possesses over the Territories of the United States. Although admiralty jurisdiction can be exercised in the *States* in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the Territories. In legislating for them, Congress exercises the combined powers of the General and of a State Government."

* On March 6, 1856, the court, under Section 7 of the act, made to Congress its first Report of cases "finally acted" on.

In the Senate, it was at once referred, without debate, to the Committee on Claims of that body.

In the House of Representatives, the disposition to be made of that Report was the subject of extended debate, in which many honorable members participated. The discussion occupied several days, and continued at intervals to May 16th, when final action was had upon the propositions of reference before the House.

A proposal to refer the Reports of, or Bills reported from, the Court of Claims to the Committee of the Whole, and place them upon the General Calendar, was negatived by nays 78 to 62 yeas.

The motion to refer them to the Committee on Claims was then put to the vote, and carried without a division, thus establishing the precedent which has since governed the action of the House in regard to Reports from the Court of Claims.

It is not possible to say, as yet, by what principle the Committee on Claims will be guided as to Reports of the court so referred to it. The next session of Congress will probably enable us to speak on the subject from experience and with knowledge.

Different reasons were alleged, in the course of the House debate, on the subject of Reference, qualifying the views of honorable members who favored the course which was adopted.

Hon. Mr. RITCHIE remarked:—

"I wish to say that the intention, in referring these bills to the Committee of Claims, is not to have them re-examined by that committee as to the facts. It is simply that that committee may read over the bills and see whether there is anything contained in them which might be considered as trenching on the privileges or rights of this House; and if there be not, that they report them back and let the House act upon them. That same reference I understand has been made unanimously in the Senate; and the practice has been heretofore, in relation to the Supreme and other courts, to give the same reference with the very same intention—not with the intention of subjecting the parties to a rehearing of the case."

Hon. Mr. JONES, of Tennessee, said:—

"It seems to me, sir, that the reports of the Court of Claims should be referred to some committee of this House, if for no other reason than that some members of this House may have their attention particularly called to them—that they may look into them, and see the merits of the cases; that they may be prepared, when we take them up in Committee of the Whole House, to give information to the two hundred and thirty odd members here of the principles involved in them. Sir, if we are to take the reports of this court as conclusive, what necessity is there for referring them at all to the Committee of the Whole House? Why not pass the bills at once?"

Hon. Mr. ALLISON, observed:—

"I rise for the purpose of expressing my desire that the action of the House shall be such as the gentleman from Ohio, who has just expressed his views, indicated; that is, that on Monday

ance with the Act creating it, reports, with its opinion or judgment, a bill for the action of Congress to carry that judgment into effect. Congress can pass the bills so reported, or not, as it may elect,* and by the latter course refuse to grant to the court

my colleague shall offer his resolution providing, that, on Friday of each week, reports from the Committee of Claims shall be in order. I voted against the proposition of the gentleman from New York to refer this resolution to the Committee of the Whole, because I desired that the bills should have an investigation by the committee, and I believed they could be reported to the House and action had upon them more speedily in that way than in any other."

The Hon. Mr. WALKER, of Alabama, who had, in the course of the debate, earnestly advocated reference to Committee of the Whole, concluded his remarks as follows:—

"At this moment I cannot recollect the name of a single member of that committee (*Committee on Claims*), and, therefore, what I say can carry with it no imputation. When we contrast that or any other committee of this House with this tribunal, I confess I must not only have all my constitutional objections removed, and the arguments that I have based on the statute refuted, but I must be satisfied that this tribunal is not so worthy of confidence and respect as a committee of this House, before I can vote for the motion to that effect. A committee changes necessarily at each session of Congress. Oftentimes, this committee is composed of gentlemen who, not being lawyers, have gone through no process of training, and are not familiar with legal rules, and of course know nothing of their application to this or that given case—of gentlemen who have other legislative demands on their time and attention, and cannot devote to the subject that thoroughness and careful research which is necessary to insure justice between the individual and the Government.

"Now, I say, contrast such a committee—I do not care how pure, how intelligent it may be, with a court composed as this is—of gentlemen who are known to the whole profession of this country—two of them, Chief Justice Gilchrist and Justice Blackford, having adorned the Supreme bench of their respective States: Mr. Blackford, of Indiana, the author of the best series of reports in this country; and the third, Mr. Scarburgh, indorsed by every lawyer in the State of Virginia, for the thoroughness of his attainments, his patience, his habits of research, and his unquestionable integrity. Why, sir, I say, can it be argued that the rights of individuals and the interests of the Government are not as secure against wrong and injury, when passed upon by such men as these, as they will be if subjected to the consideration of a committee of this House, composed of men who have other duties to perform? I say, for one, I can have no hesitation in declaring that I yield to this court far more confidence and respect than to any committee of this House; and in this every man outside of this Hall will concur."

* "It is true that Congress has a discretionary power to grant or withhold appropriations where the matter calling for it is purely and entirely of a *legislative* character; but in the case of *judgments* it has no such discretion; for the simple reason, Mr. Speaker, that the judgments are, to all intents and purposes, subsisting, ascertained *debts* against the Government, and constitutional duty and good faith require Congress to make the appropriations necessary to pay those debts. This point was settled—and perhaps I ought to have called the attention of the committee to the matter at an earlier stage of the argument—in the case of *Kendall* v. *The United States*, 12 Peters, 524 and 611. The case found its way to the Supreme Court in this wise: Congress had passed an act for the relief of Stocton and Stokes, mail contractors. By the terms of the act it was made the duty of the Solicitor of the Treasury to inquire into and determine the case, and to make his report to the Postmaster-General. The Solicitor performed his duty. He ascertained the debt due by the Government to these contractors, made his report to the proper Department, and a credit was allowed for a part of the ascertained debt, and credit was withheld for the remainder. The case finally went up to the Supreme Court. It will be perceived by my statement that the Solicitor of the Treasury was placed in the attitude of an *arbitrator*, called on to inquire into and determine on the matter in controversy between the Government and these contractors. The Court in its decision used the following language:

"'It is unnecessary to say how far Congress might have interfered, by legislation, after

what would be equivalent to execution of its judgments; but will it assume directly to revise or reverse decisions of the court? This remains to be seen. Should Congress do this, public opinion, so far delayed, will take again in hand and complete its good work in instituting the court, by asking its representatives, in the Senate and the House, to recognize fully the judicial character, qualities and functions which legally belong to the Court of Claims, as part of the national judiciary, under the Constitution independent of legislative control.

J. C. D.

the report of the Solicitor; but, if there was no fraud or misconduct in the arbitrator, of which none is pretended or suggested, it may *well* be questioned whether the relators had not acquired such a vested right as to be beyond the power of Congress to deprive them of it.'

"If this is good law, coming down to us from the Supreme Court, when it had at its head one who stands alone in the judicial annals of our country, I ask with how much more force this language applies to the *decisions and judgments* of a court erected under the Constitution itself?"—*From Hon. Mr. Walker's Speech.*

ACTS OF CONGRESS

RELATING TO THE COURT.

AN ACT

TO ESTABLISH A COURT FOR THE INVESTIGATION OF CLAIMS AGAINST THE UNITED STATES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a court shall be established to be called a Court of Claims, to consist of three judges, to be appointed by the President, by and with the advice and consent of the Senate, and to hold their offices during good behavior; and the said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred* to said court by either house

*According to the official publication in the *Globe* of the proceedings and debates of the Senate, inquiry as to the jurisdiction of the court, *in cases referred to it by either house of Congress*, arose among Senators, in the course of an interesting debate upon a private claim, on Friday, the 18th April last:

"Mr. TOOMBS. I will say to my colleague that the Court of Claims have decided that they have jurisdiction over any cases referred to them by the Senate or House of Representatives.

"Mr. IVERSON. I think not.

"Mr. TOOMBS. I understand that the court has distinctly declared that a reference by either House is a distinct head of jurisdiction, provided the case be one on which a judgment can be rendered.

"Mr. BRODHEAD. I think my friend from Georgia (Mr. TOOMBS) is mistaken as to the decision of the court. The fact of reference by either House does not give jurisdiction, according to the decision of the court, unless it falls within the three previous specified heads.

"Mr. TOOMBS. The gentleman is mistaken in point of fact."

In the Digest the reader will find the following paragraphs:

"If a contract with the Government be the foundation of the claim, this court will determine the nature and validity of such contract by the application thereto of known and well-settled principles of law. Per Gilchrist, P. J. *Todd* v *The United States.*

"The application of principles of law in this court is equally necessary in regard to the claims referred to it by 'either house of Congress' as in those of which the court has jurisdiction apart from such a reference." *Ibid.*

"This court has no authority to determine that a party has a *legal* claim against the United States, unless the claim presented comes within one of the three classes of cases specified in the act creating the court, or, if referred to the court by either house of Congress, is '*founded on some legal right.*'" Per Same. *Lindsay* v. *The United States.*

"This court is authorized to examine any case referred to it by either house of Congress, to

of Congress. It shall be the duty of the claimant in all cases to set forth a full statement of the claim, and of the action thereon in Congress, or by any of the departments, if such action has been had; specifying also what person or persons are owners thereof or interested therein, and when and upon what consideration such person or persons became so interested. Each of the said judges shall receive a compensation of four thousand dollars per annum, payable quarterly, from the treasury of the United States, and shall take an oath to support the Constitution of the United States and discharge faithfully the duties of his office.

Sec. 2. *And be it further enacted*, That a Solicitor for the United States, to represent the government before said court, shall be appointed by the President, by and with the advice and consent of the Senate. It shall be the duty of said solicitor to prepare all cases on the part of the government for hearing before said court, and to argue the same when prepared; to cause testimony to be taken, when necessary to secure the interests of the United States; to prepare forms, file interrogatories, and superintend the taking of testimony, in the manner prescribed by said court, and generally to render such services as may be required of him from time to time, in the discharge of the duties of his office. Said solicitor shall be sworn to faithfully discharge the duties of his

report its opinion upon the law, and to state the facts as it finds them to be proved; but in relation to the matters which address themselves particularly to the sound discretion and liberality of Congress, the court does not feel itself authorized to *recommend* any legislation, but, *it seems*, will submit to Congress a bill for the relief of the petitioner for such action as may be deemed proper." *Ibid.*

The court has *original* jurisdiction; in other words, any one may apply to the court without a reference (1) as to any claim founded upon an act of Congress; (2) upon claims arising out of any regulation of a Department; (3) in claims founded upon a contract, express or implied, with the United States. As to (2) claims referred to the court by either house of Congress, the court, as it appears above, *entertains* any claim so referred, but will exercise jurisdiction by rendering a judgment thereon *only* where it is "*founded on some legal right.*"

The only object, then, and the sole utility of a reference by the Senate or House, is to extend the jurisdiction of the Court of Claims to *legal* demands upon the United States *sounding in damages*—that is, *of tort* exclusively, and not of contract or arising from an act of Congress or a regulation of a Department.

But it may well be asked why make the claimant, who has suffered wrong otherwise than by violation of contract, an exception, and oblige him alone to go through the form and labor of obtaining a reference? There is no reason for it. It is a vain and useless requirement.

Why not alter the act so as to give all legal claims, both those of *tort* and of *contract*, an equal chance, and place them on the same footing? The distinction made in practice arises, I am very certain, from accident or omission, not intention. It will be fully obviated by a slight amendment of section 1 of the act. With the amendment suggested, which I have given in italics, the section would read thus:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a court shall be established, to be called the Court of Claims, to consist of three judges, to be appointed by the President, by and with the advice and consent of the Senate, and to hold their offices during good behavior; and the said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, *or on some legal right*, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress, &c.

The alteration is perhaps worthy of consideration. If adopted, it would save the time of the Senate and House, as well as much anxiety and trouble to a large class of deserving claimants.

office, in the manner prescribed for the qualification of the judges in the first section of this act; and he shall receive a compensation of three thousand five hundred dollars per annum for his services, to be paid quarterly from the treasury of the United States.

Sec. 3. *And be it further enacted*, That the said court shall have authority to establish rules and regulations for its government; to appoint Commissioners to take testimony to be used in the investigation of claims that may come before it; to prescribe the fees they shall receive for their services, and to issue commissions for the taking of such testimony, whether the same shall be taken at the instance of the claimant, or of the United States, and also to issue subpœnas to require the attendance of witnesses in order to be examined before such Commissioners; which subpœnas shall have the same force, as if issued from a District Court of the United States, and compliance therewith shall be compelled under such rules and orders as the court hereby created shall establish. When testimony is taken for the claimant, the fees of the Commissioner before whom it is taken, and the cost of the commission and notice, shall be paid by such claimant; and when taken at the instance of the government, such fees, together with all postage incurred by the solicitor aforesaid in his official capacity, shall be paid out of the contingent fund provided for said court. In all cases, when it can be conveniently done, the testimony shall be taken in the county where the deponent resides; and the commissioner taking the same is hereby authorized and required to administer an oath or affirmation to the witnesses brought before him for examination.

Sec. 4. *And be it further enacted*, That in all cases where it shall appear to the court that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not be the duty of the court to authorize the taking of any testimony in the case, until the same shall have been reported by them to Congress, as is hereinafter provided: *Provided, however*, That if Congress shall, in such case, fail to confirm the opinion of said Board,* they shall proceed to take the testimony in such case.

*"The provision of the fourth section, reserving to Congress the power to reverse a judgment *against a petitioner*, was made for the purpose of securing to the citizens the constitutional guarantee of the right to petition Congress for relief. But there is no reservation of any such power of reversal of a judgment in favor of the petitioner; and the express reservation in the one class of cases, and the non-reservation of it in the other, clearly imply that it was not intended to exist in the latter class, and especially as there was a consistent reason for it in the first and none in the last. Without reversing a judgment against a claimant, Congress would have constitutional power, on petition, to grant relief notwithstanding the judgment; and this, therefore, would be a virtual reversal. But it would have no power to divest a citizen of a right vested in him by the judgment of a court having cognizance of his case. And, even if such power existed, it would be inconsistent with the policy and object of the statute to exercise it."—*From Brief of Hon. Ex-Ch. Just. Robertson, of Kentucky.*

Sec. 5. *And be it further enacted,* That in taking testimony to be used in support of any claim before said court, opportunity shall be given to the United States to file interrogatories, or by attorney to examine witnesses, under such regulations as said court shall prescribe, and like opportunity shall be afforded the claimant in cases where testimony is taken in behalf of the United States under like regulations.

Sec. 6. *And be it further enacted,* That if any person shall knowingly and wilfully swear falsely before said court, or before any person or persons commissioned by them, or authorized by this act to take testimony in a case pending before said court at the time of taking said oath, or in a case thereafter to be submitted to said court, such person shall be deemed guilty of perjury, and, on conviction thereof, shall be subjected to the same pains, penalties, and disabilities which now are, or shall be hereafter, by law prescribed for wilful and corrupt perjury.

Sec. 7. *And be it further enacted,* That said court shall keep a record of their proceedings, and shall, at the commencement of each session of Congress, and at the commencement of each month during the session of Congress, report to Congress the cases upon which they shall have finally acted, stating in each the material facts which they find established by the evidence, with their opinion in the case, and the reasons upon which such opinion is founded. Any judge who may dissent from the opinion of the majority shall append the reason for such dissent to the report; and such report, together with the briefs of the solicitor and of the claimant, which shall accompany the report, upon being made to either House of Congress, shall be printed in the same manner as other public documents. And said court shall prepare a bill or bills in those cases which shall have received the favorable decision thereof, in such form as, if enacted, will carry the same into effect. And two or more cases may be embraced in the same bill, where the separate amount proposed to be allowed in each case shall be less than one thousand dollars. And the said court shall transmit with said reports the testimony in each case, whether the same shall receive the favorable or adverse action of said court.*

* "The provision in the seventh section, requiring the court to report to Congress its judgments, the facts, &c., does not show that, if Congress could constitutionally overrule a judgment of a court of the United States in favor of a citizen, that power was intended to be reserved in that class of cases; and especially as the act is silent as to that, while it expressly reserves the power in the opposite class of cases, in which alone there was any consistent or constitutional reason for it. But that provision in the seventh section may be presumed to be intended for preserving, among the archives of the impeaching and abolishing department of the Government, record evidence of the purity, impartiality, fidelity, ability, and usefulness of the new and experimental court; and also to have the most authentic evidence of the judg-

Sec. 8. *And be it further enacted,* That said reports, and the bills reported as aforesaid, shall, if not finally acted upon during the session of Congress to which the said reports are made, be continued from session to session, and from Congress to Congress, until the same shall be finally acted upon, and the consideration of said reports and bills shall, at the subsequent session of Congress, be resumed, and the said reports and bills be proceeded with in the same manner as though finally acted upon at the session when presented.

Sec. 9. *And be it further enacted,* That the claims reported upon adversely shall be placed upon the calendar when reported, and if the decision of said court shall be confirmed by Congress, said decision shall be conclusive; and the said court shall not, at any subsequent period, consider said claims, unless such reasons shall be presented to said court as, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.

Sec. 10. *And be it further enacted,* That it shall be the duty of the Speaker of the House of Representatives, within a reasonable time after the passage of this act, to appropriate such rooms in the Capitol at Washington, for the use of said court, as may be necessary for their accommodation, unless it shall appear to the Speaker that such rooms cannot be appropriated without interfering with the business of Congress; and, in that event, the said court shall procure, at the city of Washington, such rooms as may be necessary for the convenient transaction of their business.

Sec. 11. *And be it further enacted,* That said court shall have power to call upon any of the departments for any information or papers it may deem necessary, and have the use of all recorded and printed reports made by the committees of each house, when deemed to be necessary in the prosecution of the duties assigned by this act. Said court shall appoint a chief-clerk, whose salary shall be two thousand dollars per annum, and an assistant-clerk, if deemed necessary, whose salary shall be fifteen hundred dollars per annum, and a messenger, whose salary shall be eight hundred dollars per annum, to be paid quarterly at the treasury. The said

ment and its amount, and of the facts and arguments to show that the court had jurisdiction, and that its judgment is therefore binding. And this is the only consistent interpretation of that provision, unless Congress supposed that if, on an inspection of the record, it should consider the judgment unjust, it might withhold any appropriation for satisfying it. But if it could rightfully withhold payment that would not imply that it could control, or was intended to control, the judgment itself, or the court in rendering it; all such pretension would not only be inconsistent with the plain objects of the statute, but unconstitutional."—*Also from Brief of Ch. Justice Robertson.*

clerks shall be under the direction of said court in the performance of their duties, and for misconduct or incapacity may be removed from office by it; but, when so removed ,said Board* shall make report thereof, with the cause of such removal, to Congress, if in session, or at the next session of Congress. Said clerk and assistant-clerk shall take an oath for the faithful discharge of their duties: *Provided*, That the head of no department shall answer any call for information or papers if, in his opinion, it would be injurious to the public interest.

Approved, February 24, 1855.

AN ACT

TO AMEND AN ACT ENTITLED "AN ACT TO ESTABLISH A COURT FOR THE INVESTIGATION OF CLAIMS AGAINST THE UNITED STATES," APPROVED FEBRUARY 24, 1855.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any two of the judges of the Court of Claims, authorized by the act to which this is an amendment, approved the twenty-fourth day of February, eighteen hundred and fifty-five, shall constitute a quorum, and may hold a court for the transaction of business, and the court may appoint commissioners to take testimony in the manner prescribed in the said act.

Sec. 2. *And be it further enacted*, That an assistant-solicitor shall be appointed by the President, by and with the advice and consent of the Senate, whose duty it shall be to aid the solicitor in the performance of the duties mentioned in the said act, and shall take an oath to support the Constitution of the United States, and discharge faithfully the duties of his office, and he shall receive a salary of three thousand five hundred dollars per annum, and shall hold his office for a period of four years, unless sooner removed by the President. And the solicitor of the United States mentioned in the act to which this is an amend-

*The word "board" occurs twice in this Act, which is thus accounted for. In the Senate, where the measure originated, the proposition at first entertained, was to constitute a board or permanent committee, and a bill was framed accordingly. This proposal was, however, subsequently rejected, and a court preferred. In altering the bill already before the Senate, substituting the word "court" for "board," the amending seems not to have been thoroughly executed, the term "board" being overlooked in sections 4th and 11th. See the explanation of this in note *supra*. giving an extract on the subject from Speech of Hon. Mr. WALKER, in House of Representatives.

ment shall have power and he is hereby authorized, to employ a deputy, who shall receive a salary of two thousand five hundred dollars per annum, and whose duty it shall be to aid the said solicitor in the performance of the duties mentioned in said act in such way as the said solicitor shall direct.

Sec. 3. *And be it further enacted*, That the clerk of the said court shall be, and he is hereby, authorized to disburse, under the direction of the said court, the contingent fund which may hereafter be appropriated from time to time for the use of said court: *Provided*, He shall first give bond in such an amount, and in such form, and with such security, as shall be approved by the Secretary of the Treasury: *And provided, further*, That his accounts shall be settled by the proper accounting officers of the treasury in the same way as the accounts of other disbursing agents of the government are now settled. And from and after the first day of April, one thousand eight hundred and fifty-six, the salary of the said clerk shall be three thousand dollars per annum, and the salary of the assistant-clerk shall be two thousand dollars per annum.

Approved, August 6, 1856.

RULES OF PRACTICE

OF

THE COURT OF CLAIMS.

I.

EVERY claim shall be stated in a printed petition, addressed to the court, and signed by the claimant or his counsel.

II.

The petition must set forth a full statement of the claim, and of the action thereon in Congress, or by any of the departments, if such action has been had, specifying also what person or persons are owners thereof or interested therein, and when and upon what consideration such person or persons became so interested. If the claim is founded upon any law of Congress, or upon any regulation of an executive department, the act of Congress and the section thereof upon which the claimant relies must be stated, and the particular regulation of the department must be specified. If the claim is founded upon any express contract with the Government of the United States, such contract must be set forth in the petition, and, if it be in writing, in the words of the contract. If it be founded upon any implied contract, the circumstances upon which the claimant relies as tending to prove a contract must be specified. There must be annexed to the petition an affidavit of the claimant, or his agent, or, where there are several claimants, of one of them, or of some other credible person, that the facts stated in the petition are true, to the best of his knowledge and belief.

III.

When the petitioner cannot state his case with the requisite particularity without an examination of papers in one of the executive departments, and has been unable to obtain a sufficient examination of such papers on application, he may file a manuscript petition stating his claim as far as is in his power, and specifying as definitely as he can the papers he requires in order to enable him to state his claim. The court will thereupon make

a special order calling upon the proper department for such information or papers as it may deem necessary to be delivered to the clerk of the court to be filed in his office. The manuscript petition may then be amended, and the amended petition printed and filed, and may occupy upon the docket the place of the original petition.

IV.

Each claim shall be entered on the docket on filing the petition, or, in cases referred by either house of Congress, on filing a petition and the papers in the case referred.

V.

The claimant, when he files his petition, shall deliver to the clerk ten copies thereof for the use of the judges and the solicitor.

VI.

If the solicitor shall be of opinion that the petition does not state a proper case for the action of the court, it shall be his duty, after the filing of the petition, to furnish the clerk ten printed copies of his objections, for the judges and the claimant.*

VII.

There shall be no other pleadings than those above stated.

VIII.

If the petition be adjudged to be sufficient, the court will authorize the taking of testimony in the case.†

IX.

The court will appoint permanent commissioners for the taking of testimony, and special commissioners as circumstances may require.

Every permanent commissioner shall take an oath, before he enters upon his duties, that he will faithfully discharge them so

* This Rule has fallen altogether into disuse. With the greatly increased professional force at his command, the solicitor probably will be enabled hereafter to comply with it. To prepare for argument properly, it is necessary that the claimant should be in time apprized of the objections, which it is the intention of the government to raise in his case.

† It is the practice to allow depositions to be taken *de bene esse*, on due notice, at the risk of the claimant, even before the taking of testimony is formally authorized by the court.

long as his commission remains in force; and every special commissioner shall take an oath faithfully to discharge his duties.

The form of a commission to a permanent commissioner shall be as follows:

COURT OF CLAIMS,

To —— ——, *of* ——— *in the county of* ———, *and State of* ———,

———, *esquire:*

You are hereby appointed a commissioner, during the pleasure of this court, for the State of ———, to take the testimony of such witnesses as may come before you, to be used in the investigation of such claims as may be presented to this court against the United States. In the performance of this duty you will be guided by the rules of this court, and in making your certificate of the taking of depositions you will follow the form prescribed by the 15th rule. You will take no deposition, unless by consent of the parties, until it is shown to you, by the return upon the original notice, that the adverse party has been duly notified; and if he do not appear, you will affix the original notice to your certificate, and return it therewith for the information of the court.

—— ——, *Clerk.*

When special commissions are issued, such variations from the above form as may be necessary will be made. The several judges and clerks of the courts of record for the time being in the States and Territories of the United States, in the counties in which no permanent commissioner may reside, are hereby appointed commissioners to take testimony to be used in the investigation of claims before this court, in the counties in which they may respectively reside, during the pleasure of this court; and this rule shall be a sufficient commission to each of said judges and clerks in the premises.

The form of a subpœna shall be as follows:

COURT OF CLAIMS,

To —— ——:

You are hereby commanded to appear before —— ——, commissioner appointed by this court to take depositions, on the —— day of ———, A. D. 185—, at —— o'clock, in the ——noon, then and there to testify in the case of —— —— against the

United States, now pending in this court. Fail not of appearance, at your peril.

Dated this —— day of ———, A. D. 185—.

——— ——, *Clerk.*

XI.

The party proposing to take depositions shall cause fifteen days' notice to be given thereof to the solicitor, or to the claimant or his counsel, as the case may be. The notice must be in writing, and must state the names of the commissioner, and of the witnesses, and of the claimant, and the day of the month, the hour, and the place of taking the deposition, and must be subscribed by the solicitor or his agent, or by the claimant or his attorney of record. When the claimant proposes to take a deposition, and the witness resides more than five hundred miles from Washington, or where the solicitor proposes to take the deposition, and the witness resides more than five hundred miles from the claimant or his counsel, one day's further notice shall be given for every additional twenty miles.

XII.

If the witness, having been duly summoned and his fees tendered him, shall fail or refuse to appear and testify before any commissioner, a rule upon him shall be issued, on motion, to show cause why a fine should not be imposed upon him; and if he fail to show sufficient cause, he shall be fined not exceeding one hundred dollars.

XIII.

All witnesses shall be sworn or affirmed, before any questions are put to them, to tell the truth, the whole truth, and nothing but the truth, relative to the cause in which they are to testify; and each witness shall then state his name, his occupation, his age, his place of residence for the past year; whether he has any interest, direct or indirect, in the claim which is the subject of inquiry; and whether, and in what degree, he is related to the claimant. At the conclusion of the deposition the witness shall state whether he know of any other matter relative to the claim in question; and if he do, he shall state it.

XIV.

All evidence must be in writing, and all depositions must be taken by questions, each of which is to be written down by the commissioner in the body of the deposition, and then proposed by the commissioner to the witness, and the answers thereto are to

be written down by the commissioner in the presence of the witness. But interrogatories and cross-interrogatories may be administered under the supervision of the court whenever, in their opinion, justice and expediency require; and each deposition must be signed by the deponent in the presence of the commissioner.

XV.

The commissioner's return shall be as follows:

STATE OF ———, COUNTY OF ———, *ss.*

On this —— day of ———, A. D. ———, personally came —— ——, the witness within named, and after having been first sworn to tell the truth, the whole truth, and nothing but the truth, the questions contained in the within deposition were written down by the commissioner, and then proposed by him to the witness; and the answers thereto were written down by the commissioner in the presence of the witness, who then subscribed the deposition in the presence of the commissioner. The deposition of —— ——, taken at the request of —— ——, to be used in the investigation of a claim against the United States now pending in the Court of Claims, in the name of —— ——. The adverse party was notified, did —— attend, and did —— object.

—— ——, *Commissioner.*

Fees of witness, ———.
Travel, ———.
Attendance, ———.
Commissioner's fees, ———.

XVI.

The commissioner shall enclose the commission, depositions, and exhibits, if any, in a packet under his seal, and direct the same to the clerk at Washington, and deposit the packet in the post-office.

XVII.

The commissioner shall not be obliged to certify and forward the deposition taken for either party until his fees for the taking of the same, and the postage, shall have been paid or tendered to him by the party at whose instance the commission issued, which fees shall be such as are now, or may hereafter be, prescribed by Congress for the performance of similar duties by commissioners;* and the fees of witnesses shall also be such as are now,† or may hereafter be, prescribed by Congress, and shall be paid by the party at whose instance the witnesses appear.

*See 10 Statutes at Large, 167. † *Ibid.*

XVIII.

No objection to a deposition will be considered as waived because such objection was not taken before the commissioner.

XIX.

No counsel will be permitted to practice in the court unless he is a man of good moral character, and has been admitted or licensed to practice in the Supreme Court of the United States, or in the highest court of the District of Columbia, or in the highest court of some State or Territory, of which admission the certificate of the clerk of such court or such license will be the only evidence; and, before admission, such counsel shall be sworn to support the Constitution of the United States, and that his conduct as counsel shall be upright and according to law. But any claimant may appear in person and manage his own cause.

XX.

At the time of filing the petition, or within a reasonable time afterwards, the petitioner may, if he chooses, file a brief of the legal points and authorities on which he relies to maintain his case, and the solicitor shall, within a reasonable time thereafter, file a brief in answer thereto. The case shall then be entered on a separate docket, called the law-docket, and the cases thereon will be taken up and disposed of in their order; and cases may be entered upon the law-docket, and submitted, by consent, in vacation.

XXI.

When the claimant's case is prepared he shall notify the solicitor thereof, furnishing him at the same time with a printed copy of his brief. The solicitor, within a reasonable time thereafter, shall furnish the opposite counsel with a printed copy of his brief, and file copies of both briefs with the clerk. When the briefs are thus filed, the clerk shall enter the case on the trial-docket. At least three days before any case will be called for argument, such printed briefs shall be furnished to each of the judges, and contain all the positions and authorities relied on. No *viva voce* arguments on behalf of either party will be permitted to continue more than two hours, nor will counsel be permitted to take other grounds or to refer to other authorities than those stated in the briefs. The cases will be called for argument or submission in the order in which they shall be thus prepared.

XXII.

In the computation of time mentioned in these rules, all Sundays, and also the day of the service of any notice, and the day on which a party is required to appear, or on which any act is required to be done, shall be excluded.

XXIII.

No paper filed in a cause shall be taken from the clerk's office, except by one of the judges, without permission of the court, and by leaving a certified copy with the clerk.

XXIV.

If the claimant die pending the suit, his proper representatives may, on motion, be admitted to prosecute the claim.

LIST OF COMMISSIONERS

TO TAKE TESTIMONY.

MAINE.

John W. Dana, James O. Donnell, Charles S. Davies, James T. McCobb, *Portland.*
Daniel Williams, James L. Child, *Augusta.*
Ichabod D. Bartlett, *Bangor.*

NEW HAMPSHIRE.

Albert R. Hatch, *Portsmouth.*
Benjamin F. Ayer, *Manchester.*
William L. Foster, *Concord.*
J. D. Sleeper, *Haverhill.*
Henry Hubbard, jr., *Charlestown.*
Charles W. Woodman, *Dover.*
F. R. Chase, *Conway.*

VERMONT.

Charles L. Williams, *Rutland.*

MASSACHUSETTS.

Edward G. Loring, Daniel S. Gilchrist, Charles L. Woodbury, George S. Hale, Oliver Stevens, *Boston.*
William S. Morton, *Quincy.*
Joseph B. S. Osgood, *Salem.*
Thomas M. Stetson, *New Bedford.*

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John T. Waite, *Norwich.*
David J. Peck, *New Haven.*

RHODE ISLAND.

Levi Salisbury, *Providence.*

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Henry H. Bostwick, *Auburn.*
Robert Parker, *Delhi.*
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Charles Hughes, *Sandy Hill.*
Augustus A. Boyce, *Utica.*
Henry T. Walbridge, *Saratoga.*
R. F. Trowbridge, *Syracuse.*
Aurelian Conklin, *Buffalo.*
Robert L. Rose, *Allen's Hill, Ontario Co.*

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George W. Cassidy, *Jersey City.*
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Benjamin Grant, James Sill, *Erie.*
H. Clay Alleman, *York.*
Michael P. Boyer, *Reading.*

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James B. Hope, *Hampton.*
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George A. Gordon, *Savannah.*

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Elisha B. Jeffreys, *Union, Franklin Co.*

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Michael McLaughlin, *Dubuque.*

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Elias T. Clark, *Los Luceros*
Vincent St. Vrain, *Socerro.*
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WASHINGTON TERRITORY.

Charles H. Mason.

CHEROKEE NATION.

George Buttre, *Tahlequah.*

ENGLAND.

Samuel Meredith, I. T. Pitman, C. F. Stansbury, *London.*

ATTORNEYS AND COUNSELLORS

OF THE

COURT OF CLAIMS.

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Horace S. Brown,		"
Frank S. Fiske,	*Keene,*	"
Henry Hubbard,	*Charlestown,*	"
Samuel E. Guild,	*Boston,*	*Massachusetts.*
John A. Rockwell,		*Connecticut*
Ezra W. Dean,		*New York,*
Abraham Wakeman,		"
John O. Sargent,		"
N. Titus Wakeman,		"
Samuel C. Reid,		"
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John Fitch,	*Troy,*	"
Charles K. Averill,	*Rouse's Point,*	"
Samuel E. Lyon,	*White Plains,*	"
Lemuel Jenkins,	*Albany,*	"
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Nathan Sargent,	*Philadelphia,*	*Pennsylvania.*
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James Dunlap,	"	"
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James D. Stevenson,		"
Thomas H. Baird,		"
Charles Naylor,		"
Simon Stevens,		"
Joseph Howard,		*Ohio,*
Joseph H. Coombs,		"
Samuel F. Vinton,		"
William H. Miller,		"
Israel Williams,		"
John W. Allen,		"
Thomas Ewing,		"
Robert C. Schenck,	*Dayton,*	"
Hester L. Stevens,	*Pontiac,*	*Michigan.*
William H. Gurley,	*Davenport,*	*Iowa.*
Joseph B. Stewart,	*Louisville,*	*Kentucky.*
George Robertson,	*Lexington,*	"
Joseph S. Williams,		*Tennessee.*
J. Knox Walker,		"
John S. Tyson,	*Baltimore,*	*Maryland.*
Reverdy Johnson,	"	"

Francis H. Davidge,	*Baltimore,*	*Maryland,*
Z. Collins Lee,	"	"
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A. H. Evans,	*Washington,*	*D. C.*
N. C. Towle,	"	"
C. W. Downing,	"	"
C. H. Stewart,	"	"
B. B. French,	"	"
Richard S. Cox,	"	"
J. M. Carlisle,	"	"
John H. Craig,	"	"
Charles Abert,	"	"
S. S. Baxter,	"	"
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William B. Webb,	"	"
William H. Merrick,	"	"
Richard H. Clark,	"	"
M. Thompson,	"	"
F. P. Stanton,	"	"
A. H. Lawrence,	"	"
William H. Philip,	"	"
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Vespasian Ellis,	"	"
S. S. Williams,	"	"
P. Phillips,	"	"
Ferdinand Moulton,	"	"
Willie P. Mangum, Jr.,	"	"
Nathaniel Hatch,	"	"
Charles Lee Jones,	"	"
Asbury Lloyd,	"	"
Walter D. Davidge,	"	"
George M. Bibb,	"	"
Alexander Anderson,	"	"
John C. Brent,	"	"
Christopher Ingle,	"	"
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John F. Clement,	"	"
John McCalla,	"	"
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Charles H. Winder,	"	"
Silas H. Hill,	"	"
Josiah F. Polk,	"	"
S. S. Chilton,	"	"
C. W. Bennett,	"	"
Andrew Wylie,	"	"
F. W. Resque,	"	"
John S. Develin, Jr.	"	"
John A. Linton,	"	"
George W. Brent,	"	"
James W. McCulloch,	"	"
Henry M. Nourse,	"	"
John F. Ennes,	"	"
Cogswell K. Green,	"	"
R. J. Walker,	"	"
Louis Ganin,	"	"
Hamilton L. Shields,	"	"
N. Carroll Mason,	"	"
Daniel Radcliffe,	"	"
Richard Martin Young,	"	"
R. T. Merrick,	"	"
Edward C. Carrington,	"	"
Aaron Height Palmer,	"	"
Walter S. Coxe,	*Georgetown,*	"
S. Louis Kinzer,	*Alexandria,*	*Virginia.*
Daniel Funstin,	"	"
Charles Wm. Blincoe,	"	"
Richard K. Meade,	*Petersburg,*	"
John L. Pendleton,		"
Erastus T. Montague,		"
S. L. Lewis,		"
James T. Stretten,		"
John R. Kilby,		"
George E. Badger,	*Raleigh,*	*North Carolina.*
James A. Black,	*Columbia,*	*South Carolina.*
Daniel Bailey,	*Charleston,*	"
Robert C. Gilchrist,	"	"
Charles J. McDonald,	*Marietta,*	*Georgia.*
B. R. Harrison.	*Lumpkin,*	"

Thomas M. Blount,		*Florida.*
Jefferson F. Jackson,	*Montgomery,*	*Alabama.*
Charles E. Sherman,		"
Jacob Barker,	*New Orleans,*	*Louisiana.*
Albert Pike,		*Arkansas.*
James B. Colt,	*St. Louis,*	*Missouri.*
William C. McDougal,		*California.*
John A. Godfrey,	*San Francisco,*	"
John S. Watts,	*Santa Fé,*	*New Mexico.*
John L. Hayes.		
Frederick Vincent.		
F. F. C. Triplett.		
Richard B. Bayard		
Worthington G. Snethen.		

ARTICLES

ON THE CHARACTER, FUNCTIONS AND JUDICIAL POWERS OF THE COURT.

COURT OF CLAIMS.

THE Constitution of the United States provides, art. 3, sec. 1, that—

"The *judicial power* of the United States shall be vested in one Supreme Court, and in such *inferior courts* as the Congress may *from time to time* ordain and establish."

The judges are to be appointed by the President and Senate, are to hold their offices "during good behavior," to be sworn "to support the constitution," and the constitution is, by its own terms, made "the supreme law of the land."

Art. 1, sec. 1, declares that "*all legislative powers* herein granted shall be vested in a *Congress* of the United States;" and by art. 2, sec. 1, "the *executive power* shall be vested in a *President* of the United States of America."

The *Court of Claims*, established by the last Congress, is *a regular constitutional Court of the United States*, the judges of which have been appointed by the President and Senate as the constitution requires, hold their offices by the act establishing the court "during good behavior," and have been sworn "to support the constitution."

This being the character of this tribunal, Congress could not constitutionally assign to it "any duties but such as were properly *judicial*, and to be performed in a *judicial manner*."

The judicial powers being, by the constitution, entirely distinct from, and independent of, the legislative department, Congress could not constitutionally reserve to itself the authority "to sit as a court of errors on the judicial acts or opinions of this court."

This doctrine is fully sustained by the opinions of all the judges of the district, circuit, and supreme courts of the United States, in their communications addressed to President Washington in regard to their duties under the pension act of 1792, to be found in American State Papers, vol. 1; "Miscellaneous," pp. 49 to 53; 2 Dallas, pp. 409, 410, 411, Note to Hayburn's case; 1 Curtis' Decisions of the Supreme Court, pp. 9, 10, 11, 12, Note.

The judges declare this *separation* of the legislative and judicial powers, and the entire independence of the latter, "a principle important to freedom."

Under that act all the judges refused to act as judges where their decisions were subject to the revision of an executive officer (the Secretary of War) or that of Congress; declaring such a revision of the judicial action of the courts and judges *unconstitutional*.

A portion of the judges undertook to act in their *individual* capacity as commissioners, and not as judges or a court; but the Supreme Court, after full argument, decided unanimously, in 1794, that the judges *could not constitutionally act in any capacity but a judicial one*, and that their acts in any other capacity were unauthorized by the constitution, and void. *Ib.* vol. State Papers, p. 78, letter of William Bradford, Attorney-General, to the Secretary of War, communicating the decision of the Supreme Court. The case was carried before the Supreme Court by the direction of an act of Congress, and the action of the judges as *commissioners* was declared void by Congress on the authority of the decision of the Supreme Court. (1 vol. Stat. at Large, pp. 324, 401.)

There was a doubt whether the duties to be performed by the courts and judges under the act of 1792 were of a *judicial nature*; but there is, and can be no doubt, that the duties to be performed by the Court of Claims are of a strictly judicial character, since they are "*to hear and determine* all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States;" which duties are, in the strictest sense, judicial. The act, it is true, also gives the court jurisdiction of "all claims which may be referred to said court by either house of Congress;" but this clause has been construed by the court to mean claims of the character before described, and not to give it jurisdiction of claims which are not founded upon any established principles of law or equity, and are, therefore, not of a judicial character, since there would be no known rule of law to apply to them, and nothing for *judicial ratiocination* to take hold of and act upon.

Claims of this latter character are dismissed by the court and

returned to Congress, as proper subjects for the exercise of the legislative and not the judicial power.

The Court of Claims, then, acts *judicially*, and cannot constitutionally act otherwise; and its judicial decisions, on cases within its jurisdiction, cannot be revised and reversed by Congress without a violation of the constitution; but still, Congress possesses the *legislative* discretion of making appropriations to pay the decisions of the court or not, as they shall see fit. This gives the most ample control to Congress; and it is clearly all they can constitutionally exercise.

The Court of Claims acts "by process of law," with all the steps and precautions of a regular judicial proceeding; testimony is taken upon examination and cross-examination; and the cases are fully argued in open court by counsel, both in behalf of the United States and the claimants; after which the decision of the court is made upon established legal principles, and after the most careful judicial deliberation.

To treat judicial decisions thus made upon the legal claims of the citizens of the United States against their government as the mere reports of a *sub*-committee of Congress, would seem to be trifling with the rights of the people, the dignity of the judicial power, as defined and limited by the constitution, and the sacredness of public justice.

To show the necessity for such a tribunal, and the authority and duty of Congress in relation to its establishment, I beg leave to quote the following section from Judge Story's Commentaries on the Constitution, where, speaking of the want of some judicial tribunal to ascertain and establish the just demands of the people against the government, he says:

"It has been sometimes thought that this is a serious defect in the organization of the judicial department of the national government. It is not, however, an objection to the constitution itself; but it lies, if at all, against Congress for not having provided (as it is clearly within their constitutional authority to do) an adequate remedy for all private grievances of this sort in the courts of the United States. In this respect, there is a marked contrast between the actual right and practice of redress in the National government, as well as in most of the State governments, and the right and practice maintained under the British constitution. In England, if any person has, in point of property, a just demand upon the king, he may petition him in his court of chancery, (by what is called a petition of right,) where the chancellor will administer right, theoretically, as a matter of grace, and not upon compulsion; but, in fact, as a matter of constitutional duty. No such judicial proceeding is recognized as existing in any State of this Union, as a matter of constitutional

right, to enforce any claim or debt against a State. In the few cases in which it exists, it is matter of legislative enactment. Congress have never yet acted upon the subject so as to give judicial redress for any non-fulfilment of contracts by the National government. Cases of the most cruel hardship and intolerable delay have already occurred, in which meritorious creditors have been reduced to grievous suffering, and sometimes to absolute ruin, by the tardiness of a justice, which has been yielded only after the humble supplications of many years, before the legislature. One can scarcely refrain from uniting in the suggestion of a learned commentator, that, in this regard, the constitutions, both of the National and State governments, stand in need of some reform to quicken the legislative action in the administration of justice; and that some mode ought to be provided by which a pecuniary right against a State or against the United States, might be ascertained and established by the judicial sentence of some court; and, when so ascertained and established, the payment might be enforced from the national treasury by an absolute appropriation. Surely it can afford no pleasant source of reflection to an American citizen, proud of his rights and privileges, that in a monarchy the judiciary is clothed with ample powers to give redress to the humblest subject in a matter of private contract or property against the crown; and that in a republic there is an utter denial of justice, in such cases, to any citizen through the instrumentality of any judicial process. He may complain, but he cannot compel a hearing. The republic enjoys a despotic sovereignty to act or refuse, as it may please; and is placed beyond the reach of law. The monarch bows to the law, and is compelled to yield his prerogative at the footstool of justice." (3 Story's Com. on Const., sec. 1672.)

No act has been passed since the adoption of the constitution, more creditable to Congress, or in which the people have a deeper interest, than that establishing the Court of Claims; and it is not to be doubted that its labors will be properly appreciated by Congress, and its decisions treated with the respect to which they are entitled under the constitution.

WASHINGTON, March 8, 1856. *Washington Union.*

COURT OF CLAIMS.*

When this new judicial tribunal was erected, the hearts of many were cheered with the hope that they saw the goal of the weary race they had been running from youth to age in order to obtain rights denied or dues withheld. It was thought that they had now an opportunity of establishing their claims by proper proofs, and of having them fairly and finally adjudicated by learned and upright men. Some fears, however, are entertained that in this happy result they will be disappointed. Until a recent period I never heard a doubt expressed as to the power of this court "to hear and determine" all cases that should come within the range of its ample jurisdiction, as declared by the creating act. But it seems that many entertain the opinion that it has in fact no judicial function, in the proper sense, and is really nothing more than a mere examining and advisory committee. If this view is correct it will operate great hardship and injustice. There are persons who have been for perhaps half a century soliciting Congress for money really owing to them by the government. Their yearly hopes have been frustrated, not by denial, but by delay. This, however, causes great expense and loss of time. I met a man in the street a day or two ago who told me he had a claim for about $10,000, and that he had already spent half that sum in his fruitless endeavors to get the decision of Congress. This unreasonable protraction arises perhaps from a misapprehension, I will not say disregard, of a constitutional injunction. In the eighth section it is provided that "Congress shall have power to lay and collect taxes, duties, imposts, and excises, *to pay the debts* and provide for the common defence and general welfare of the United States," &c. This is the very first clause of the section, and creates a primary obligation. It stands in order before functions in relation to policy; and, as every grant of political *power* imports a correlative *duty* charged upon the public agents, it follows that the members of both houses are sworn to take care that all national liabilities are promptly and fairly extinguished. By the sixth article "all debts contracted and engagements entered into under the confederation" are "valid against the United States." The old soldier of the Revo-

* This article, on the character, functions and judicial powers of the court, appeared in the *National Intelligencer* of July 3, 1856, with the editorial introduction:

"A retired Jurist, one who long held a seat on a State Bench with ability and honor, has employed some leisure hours in preparing the subjoined full and able examination of a question of professional and public interest."

lution, therefore, and his descendants, have a chartered guarantee that the promised reward of his faithful and perilous services shall be rendered. This pledge of "*the people*," however, has not been well redeemed by their representatives. Scarcely a session has passed during the long period of our separate national existence without numerous applications for money alleged to be due by the government. Some of these demands, after years of delay, have been allowed, others remain yet unsatisfied. It is difficult to account for this vexatious remissness in the adjustment and discharge of their engagements. Is there a constitutional injunction "to pay the debts of the United States"? If there is, there has been neglect amounting to delinquency.

Perhaps there are members of Congress who hold the doctrine entertained by some great men, that their oath only binds them "to support the Constitution" *as they understand it:* and seeing a "power" granted, without any command in terms that it shall be exercised, they regard it as optional merely. Others may be disposed to take the ground assumed by Governor McKean, of Pennsylvania, who, when called upon to perform an executive function indicated in the Constitution of that State by the phrase "may"—equivalent to the word I have quoted—refused positively to do so. Some citizens respectfully urged that when the fundamental law declared that the Governor *may* do a particular act, it imported the *duty* of doing the act. His Excellency, without "argufying the topic," set the matter at rest by simply saying: "I'll let you know, gentlemen, that *may* means *won't.*" So the Constitution of the United States declares that Congress shall have "power to pay the debts," &c., of the government; but members acting under their peculiar notions of moral and political obligation, say they "won't," and the poor claimant has no remedy. Some folks think there is a "higher law" that overrides all Constitutions, and that it is to be ascertained and interpreted, not by jurists and statesmen, but by the religious, moral, and intellectual vagaries of every man's own mind and *conscience*, as he calls it. This leads to great uncertainty and irregularity in our political agencies, and puts public affairs at sixes and sevens.

It was supposed that the erection of the Court of Claims would have a salutary effect in several aspects: 1st. It would relieve Congress from a vast amount of labor, some of which, and particularly in relation to claims resting upon legal grounds, promiscuous committees were not well fitted to investigate. 2d. It would afford to every citizen who had a demand against the government the opportunity of having his case examined with the safety and precision that judicial rules and forensic habits insure, and would give confidence that it will be fairly decided according to the law. 3d. The adjudication upon a just and legal claim

would place it in the category of the constitutional injunction, and remove every pretext for the delay of payment. It could no longer be said that the "debt" was not ascertained, and therefore must be examined by a committee.

Unless the action of the court has these results, instead of being beneficial it will be most disastrous to the claimant. He is compelled to appear before a tribunal far distant from his domicil, and to attend perhaps for many months, at great expense, awaiting an opportunity for a trial. He must employ counsel, and give him a considerable portion of the amount he may recover as a fee; a second hearing is ordered upon the facts, and he must procure his testimony, &c. This is the order.

During all this process his time is running on and his business at home is neglected. But at length he obtains a favorable "decision," and hopes soon to receive the fruits. Alas! as is now alleged, he is just where he started. His case must still undergo Congressional scrutiny, A committee, selected from different departments of social life, may "rejudge the justice" of a court of law, and the unhappy suitor discover at last that he has been only wool-gathering.

I cannot think that justice or true policy can allow so unfit and incongruous a course. It seems, however, from the import and effect of a resolution lately adopted in the House of Representatives, that this view is entertained. Several grave questions, therefore, are involved, which I wish briefly to examine, and I hope members of Congress will weigh them wisely and well before they are committed by any definite action.

What, then, is the character, the functions, and the judicial power of the Court of Claims?

It is a constitutional tribunal, as much so as the Supreme Court; and so far as jurisdiction is confided, its faculties are as ample and unrestrained. The 1st section of the 3d article declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish," &c. All the judges hold office during "good behavior," and are equally independent.

The Court of Claims has all the paraphernalia of a high judicial forum, and is "inferior" to the Supreme Court only in rank, not in any essential prerogative. This, then, is its character.

Its functions are defined in the creating act: "The said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, which may be suggested to it by a petition

filed therein; and also all claims which may be referred to said court by either house of Congress."

The words here granting power are technical. We find them in 29th Edward I., which enacts that a writ "*ad audiendum et terminandum*," should not be issued but in special cases and for certain causes at the king's command, &c. The equivalent phrase, "*oyer and terminer*," was afterwards adopted, and has been introduced into our criminal jurisprudence as indicating the highest penal tribunal, before which the greatest man in the nation may be arraigned and tried for his life without appeal.

To "hear and determine" means that the court shall attend to the evidence and the law that may be applicable, and by their "decision" "cut off" or end the controversy. The expression imports a finality.

The whole context of the law confirms this view, and the only case in which Congress appears to reserve a power to disaffirm the action of the court, is when it has made an unfavorable report. (See section 4.)

In such case, "if Congress fail to confirm the opinion of said *board*, they shall proceed to take the testimony," &c. It seems here as if the judicial character of the judges is suspended until the matter is recommitted to them. They are considered as mere examining commissioners; but when the decision is "favorable" to the claimant it is provided that "said court (not 'board') shall prepare a bill or bills, &c., in such form as, if enacted, will carry the same into effect."

The phraseology is remarkable. The *losing party* has still a chance by an application to Congress, and even if he fail then he may ask "a new trial" from the court; but the successful suitor has no further remedy provided for him if his bill does not pass.

I will not enlarge further upon the functions of the Court. Its judicial power—within the range of its granted jurisdiction—is full, final, and unrestrained, except by the guards of the Constitution. There is no appeal given to any other tribunal, nor is there a forum designated where its decisions may be reviewed and even its errors corrected. If this is a defect in the plan, it can only operate prejudicially to the private suitor. The nation, as a party, would have every advantage, if any principle but "summum jus" could have a lodgment under the judicial ermine. The court was created by the government, and is part of the great political machinery. The judges were appointed by the government, and are paid by the government. Claimants generally have no "prestige" that could avail, even with men who would "truckle with worldly policy."

The "determinations," then, of this court are the "end of

all strife," and the peremptory rule, "*stare decisis*," ought to be rigidly maintained. It is the only safe rule. But it is said that Congress has reserved a supervisory authority to reverse or confirm the reports returned, &c. I deny that there is anything in the creating law that indicates such a purpose. It would be exceedingly unjust to a claimant if, after having his case fully developed before a learned court, he should be compelled to hazard in unfavorable circumstances an impromptu trial before a committee of Congress. A full and fair examination could not be attained. There have been cases tried before the Court of Claims that have occupied a whole week of laborious session. Now, if a committee of Congress should devote so much time to the investigation of claims, they must neglect their other public duties; yet if they are to reverse the decision of a legal tribunal, they ought to "beat the ample field." They should diligently inquire into every particular of law and of fact that was before the Court, and they ought to have the arguments of the counsel. But there is another insuperable difficulty. Congress is not composed of lawyers. There are, to be sure, many able men of the profession in both Houses; the great body of the members, however, are from all the varied pursuits of life. Experienced and learned jurists are not always selected for the committees, and to review the opinion of a court by any others would be hazardous, and therefore wrong. For these reasons, and many others that could be given, I say that the idea of making our House of Representatives an appellate court in the last resort is simply absurd.

In England, the Lords constitute the dernier court of errors and appeals. They are hereditary statesmen and judges; and it is supposed that their education, habits, and experience well fit them for the performance of their high duties. Lately, however, there has been complaint of the want of legal learning in that House, and the Queen has proposed to create some distinguished lawyers Peers for life, in order to supply the deficiency and secure an efficient court of appeal.

I will not urge further argument, *ab inconvenienti*. There are many gentlemen in Congress who will see them as clearly as I do, and I submit to their consideration. There is, however, another particular which I wish to suggest. It is my opinion that the exercise by the House of Representatives of a revisory power over the decisions of the Court of Claims would be a violation of the Constitution. This question, as involving a great principle of political law, is interesting to the whole nation, and ought to be examined with candor and care. I desire to consider it, therefore, with all due respect to the honorable body whose action I may *seem* to impugn, though I only intend to ask their calm reflection upon the matter before it be too late.

In the Constitution of the United States the sovereignty, so far as it is delegated by "the people," is distributed into three classes of agencies: the legislative, the executive, and the judicial. All these departments are co-ordinate, yet separate and independent. They co-operate in effecting the just and wise purposes of administration, but without infringing, and thus form a nice adjustment of checks and mutual aids. This triangular arrangement is very strong. Owen says that the word "three," in its primary sense, means "fixed" or "firm;" and we are told in Ecclesiastes that "a three-fold cord is not quickly broken." At all events, I believe that our form of government is better calculated than any other "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty," &c.

These results, however, can only be attained by carefully preserving the exact equilibrium between the different agencies employed. If one branch should be allowed to encroach upon the domain of another, the just balance is disturbed, the symmetry of the political fabric is destroyed, and the public safety is impaired.

The principal sources of danger to our system are two: 1. Tyranny; 2. Usurpation. The evils arising from excessive party spirit may be classed with this last particular. I will merely say at present of the first, that its origin is the dominion of the sword, its progress is military despotism, and the end is slavery. It is the exercise of a power to which no man can have a right.

2. Usurpation occurs when one constitutional agent transcends the bounds of his proper authority, and assumes the prerogative of another. This invasion of the organic law can only be committed by the Legislature, the Executive, or the Judiciary. None of the governmental faculties are confided to a military department, therefore the leader of an army, if he encroach upon the rights of the people, subverts the Constitution; and his rule is tyranny, not usurpation. There is little cause of alarm from this quarter, if the people are true to themselves.

The great evil to be apprehended is from the arrogation of power by any one of the three civil agencies, thus destroying the nice balance which is indispensable to the proper working of the political machinery. Thus, if the President should undertake "to lay and collect taxes," "to borrow money on the credit of the United States," "to declare war," &c., these acts or any of them, would be *usurpation*, because the power exercised belongs to Congress. If the Judiciary should attempt "to make treaties," "to appoint ambassadors, other public ministers and consuls," it would be *usurpation*, because it encroaches upon the prerogative of the Executive, &c. So also if the Legislature

were to try the title of a citizen to his estate or his right to a chattel, it would be *usurpation*, because an assumption of judicial power. These infractions may be so slight at first as to be scarcely perceptible; but repeated abrasion may at last destroy.

Washington has said, "One method of assault may be to effect in the form of the Constitution alterations which will impair the energies of the system, and thus to undermine what cannot be directly overthrown;" and he has left on record this important caution, "let there be no change by *usurpation;* for though this in one instance may be the instrument of good, it is the customary weapon by which governments are destroyed."

It is said that Congress will consider the cases reported by the Court of Claims, and affirm or reverse, according to the view that may be taken of the law and the facts involved. I assert that this would be the exercise of an "appellate jurisdiction" and an arrogation of "judicial power."

By the second section of the third article of the Constitution it is declared, that there may be "controversies to which the United States shall be a party." Heretofore, however, as there was no legal process given to bring the government "*in medio foro*," this provision has been of no avail to the private citizen. If he became liable to the nation for a sum of money he could be sued in any court, and, although he might have a counter claim for five times the amount, it would not save him from ruin. He might be ground to powder in the legal mill, and for what was *due to him* he must go to Congress and petition, for years perhaps, to obtain his right. No set-off could be pleaded against inexorable Uncle Sam. The Court of Claims was created to remedy this severe anomaly in the administration of justice. There is now a mode provided by which the government may be made a defendant at the suit of a person who alleges that he has a demand arising out of any "contract, express or implied," &c.

By proper suggestions, in the form of a "petition," the case is brought within the cognizance of the Court. In a prescribed mode the proofs are obtained on both sides; and, after a due preparation, a trial is had and an adjudication made with all the solemnities of judicial administration. What is the effect of this proceeding? is the question. If the opinion of a majority of the judges is in favor of the party plaintiff, does it amount only to a recommendation that Congress shall allow the claim? or is it a determination by a constitutional and competent tribunal that the demand is just and legal, and constitutes a "debt" which must be "paid"? This last consequence must follow; or fail, 1st, for want of judicial power in the court; or, 2d, because there is some appellate jurisdiction vested by which its action may be nullified or reversed.

I will examine briefly each of these particulars; and, 1st, does the Court of Claims possess, within its prescribed range, that portion of the sovereignty of the people which pertains to the distribution of justice? The Constitution (article 3d) declares that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish." Here the whole stock is disposed of. Not a vestige of it remains to be exercised by the Legislature, except in two specified particulars, viz., 1. "Each house shall be the judge of the elections, returns, and qualifications of its own members;" "may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member"—(Sec. 5th;) and "the Senate shall have the sole power to try all impeachments." —(Sec. 3d of article 1st.)

These provisions exhaust the authority confided in the Legislature to "hear and determine" controversies involving law and fact. It is a wise and safe restriction. The ablest writers have urged the propriety of separating the legislative, executive, and judicial powers of the government, and our Constitution fully asserts the policy.—(See Locke, Essay on Civil Government, part 2d; Montesquieu, Esprit des Lois, 11th, 6th.)

If the Court of Claims is a legal tribunal, in the category of the organic law, it must possess within its defined jurisdiction full and undivided judicial power. Is there anything deficient in the creating act in regard to the potential agency of this new forum? It is styled a "court," which denotes "persons assembled to hear and decide causes." The functionaries are called "judges." This word is from the Latin "*judex*," and is compounded of "*jus*" and "*dico*," to pronounce the right. Webster defines it to mean "a civil officer who is invested with authority to hear and determine causes," &c. The result is a "decision," which imports a "final judgment or opinion in a case which has been under deliberation or discussion." If it is "favorable" to the claimant, it is provided that "the said Court shall prepare a bill or bills," &c., "in such form as, if enacted, will carry the same into effect." The whole phraseology indicates ample and perfect "judicial" power. Nothing is wanting but the faculty to coerce obedience by execution. This the Court cannot issue; but it does what is equivalent; it establishes an adjudicated claim to be a "debt" against the government, and the Constitution enjoins that it shall be paid by Congress. It is not the case of a demand open and unascertained, and threfore subject to examination; but it is a fixed liability, determined by the highest process of investigation, and nothing remains but its prompt discharge. To "support the Constitution" in this, as in every other particular, is the sworn

duty of every member of Congress. He may, to be sure, disregard the obligation; he may say that "may means won't," and refuse "to pay a debt of the United States," but he "takes the responsibility" of such delinquency. But has the government an appeal from the decision of its own Court when rendered in favor of a private citizen claimant? By the 2d section of the 3d article of the Constitution it is declared that in certain cases mentioned "the Supreme Court shall have appellate jurisdiction both as to law and fact," "with such exceptions and such regulations "as the Congress shall make." There is no provision, however, in the creating law, or any other enactment, giving an appeal from the decisions of the Court of Claims; therefore none exists. Neither is there any revisory faculty reserved to Congress; and if there were it would be an arrogation of judicial power, and therefore null and void, because in violation of the Constitution. The only case in which supervision can be exercised is where the Court report unfavorably to a claimant. There Congress may refuse to "confirm the opinion," and remand it for judicial action.

From the hasty and imperfect view I have thus presented, I think it appears, 1st, that the Court of Claims is a constitutional legal forum, with all the usual faculties and prerogatives; that it possesses judicial power, and therefore has this attribute of sovereignty within the range of its jurisdiction; 2d, that its "decisions," with regard to the subject-matter litigated before it, are final and conclusive when "favorable" to the claimants; 3d, that there is no tribunal to which an appeal can be made; 4th, that Congress has no revisory authority over its opinions, except where unfavorable reports are made. (See sections 4th and 9th.)

My examination might have been much extended, but, as my object is to offer suggestions only, what I have said may suffice. Grave questions are involved, and I think Congress ought to be careful lest they inadvertently disturb the safe balance of the Constitution by refusing to carry out the adjudications of this high Court, within the limits of a strictly legal administration.

In claims not founded on any positive enactment, nor arising *ex contractu*, I presume this tribunal will not exercise jurisdiction unless it is specially conferred. Such cases will continue to be determined by Congress according to meritorious circumstances, as estimated by the conceptions of moral justice that members may entertain. The old distinction between law and equity will thus be preserved.